

Docketed:  
September 29, 1997

Court: Supreme Court of California

Entry Date

Proceedings and Orders

Sep 29 1997 Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 29, 1997)

Oct 22 1997 Motion of California Public Defenders Association for leave to file a brief as amicus curiae filed.

Oct 30 1997 Waiver of right of respondent California to respond filed.

Nov 6 1997 DISTRIBUTED. November 26, 1997

Nov 18 1997 Response requested.

Dec 17 1997 Brief of respondent California in opposition filed.

Dec 22 1997 Reply brief of petitioner Angel Jaime Monge filed.

Dec 31 1997 REDISTRIBUTED. January 16, 1998

Jan 16 1998 Motion of California Public Defenders Association for leave to file a brief as amicus curiae GRANTED.

Jan 16 1998 Petition GRANTED. limited to the following question: "Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply.

SET FOR ARGUMENT April 28, 1998.

\*\*\*\*\*

Feb 2 1998 Motion of petitioner for appointment of counsel filed.

Feb 4 1998 DISTRIBUTED. February 20, 1998 (Page 4)

Feb 10 1998 Joint appendix filed.

Feb 23 1998 Motion for appointment of counsel GRANTED and it is ordered that Cliff Gardner, Esquire, of San Francisco, California, is appointed to serve as counsel for the petitioner in this case.

Feb 26 1998 Brief of petitioner Angel J. Monge filed.

Feb 27 1998 Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

Mar 16 1998 CIRCULATED.

Mar 26 1998 Brief amicus curiae of Criminal Justice Legal Foundation filed.

Mar 27 1998 Brief of respondent California filed.

Mar 27 1998 Brief amicus curiae of United States filed.

Mar 27 1998 Brief amici curiae of Massachusetts, et al. filed.

Mar 27 1998 Brief amicus curiae of California Public Defenders Association filed.

Mar 31 1998 Motion of Solicitor General for leave to participate in

Entry      Date

Proceedings and Orders

---

	oral argument as amicus curiae and for divided argument filed.
Apr 10 1998	Reply brief of petitioner Angel J. Monge filed.
Apr 10 1998	Record filed.
Apr 20 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 28 1998	ARGUED.



97-6146 (2)

No. 96 -

**ORIGINAL**

Supreme Court, U.S.  
F I I F 13

SEP 29 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1996

---

---

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

---

---

CLIFF GARDNER  
GARDNER & DERHAM  
Ghirardelli Square  
900 North Point  
San Francisco, CA 94109  
(415) 922-9404

Attorney for Petitioner  
Angel J. Monge

RECEIVED

SEP 29 1997

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

1091PM

97-6146  
Monge  
v.  
California

QUESTION PRESENTED

- 1) Does the Double Jeopardy Clause apply to non-capital sentence enhancement trials which expose a defendant to a potential life sentence and which contain all the hallmarks of a trial on guilt or innocence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

QUESTION PRESENTED ..... i

OPINION BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 5

I. CERTIORARI MUST BE GRANTED TO RESOLVE A STARK SPLIT OF  
AUTHORITY THROUGHOUT THE NATION AND DECIDE WHETHER  
THE DOUBLE JEOPARDY CLAUSE PERMITS THE STATE MULTIPLE  
CHANCES TO PROVE THE TRUTH OF NON-CAPITAL SENTENCE  
ENHANCEMENTS IT WAS UNABLE TO PROVE AT A FIRST TRIAL .... 8

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### CASES

<u>Arizona v. Rumsey</u> , 467 U.S. 203 (1984) . . . . .	5
<u>Briggs v. Procunier</u> , 764 F.2d 368 (5th Cir. 1982) . . . . .	11
<u>Bullington v. Missouri</u> , 451 U.S. 430 (1981) . . . . .	5
<u>Caspari v. Bohlen</u> , 510 U.S. 383 (1994) . . . . .	6
<u>Cooper v. State</u> , 631 S.W.2d 508 (Tex. 1982) . . . . .	10
<u>Denton v. Duckworth</u> , 873 F.2d 144 (7th Cir. 1989) . . . . .	11
<u>Durham v. State</u> , 464 N.E.2d 321 (Ind. 1984) . . . . .	11
<u>Durosco v. Lewis</u> , 882 F.2d 357 (9th Cir. 1989) . . . . .	10
<u>French v. Estelle</u> , 692 F.2d 1021 (5th Cir. 1982) . . . . .	11
<u>Hunt v. New York</u> , 502 U.S. 964 (1991) . . . . .	6
<u>In re Yurko</u> , 10 Cal.3d 857 (1974) . . . . .	9
<u>Linam v. Green</u> , 685 F.2d 369 (10th Cir. 1982) . . . . .	11
<u>Lockhart v. Nelson</u> , 488 U.S. 33 (1988) . . . . .	6
<u>People v. Braccamonte</u> , 119 Cal.App.3d 644 (1981) . . . . .	9
<u>People v. Meyers</u> , 5 Cal.4th 1193 (1993) . . . . .	9
<u>People v. Morton</u> , 41 Cal.2d 536 (1953) . . . . .	9
<u>People v. Quintana</u> , 634 P.2d 413 (Colo. 1981) . . . . .	10
<u>People v. Reed</u> , 13 Cal.4th 217 (1996) . . . . .	9
<u>People v. Santamaria</u> , 8 Cal.4th 903 (1994) . . . . .	9
<u>People v. Tenner</u> , 6 Cal.4th 559 (1993) . . . . .	9

<u>Spencer v. Georgia</u> , 500 U.S. 960 (1991) . . . . .	7
<u>State v. Hennings</u> , 670 P.2d 256 (Wash. 1983) . . . . .	10
<u>State v. Lee</u> , 660 S.W.2d 394 (Mo. 1983) . . . . .	11
<u>Teague v. Lane</u> , 489 U.S. 288 (1989) . . . . .	6
<u>United States v. DiFrancesco</u> , 449 U.S. 117 (1980) . . . . .	5

### STATUTES

#### PENAL CODE

Section 667 . . . . .	4
Section 667, subdivisions (b) through (i) . . . . .	3
Section 667(e)(1) . . . . .	4
Section 969½ . . . . .	9
Section 1025 . . . . .	8
Section 1158 . . . . .	9
Section 1170.12, subdivisions (a) through (d) . . . . .	3

#### UNITED STATES CONSTITUTION

Fifth Amendment . . . . .	2
Fourteenth Amendment . . . . .	2

#### OTHER AUTHORITIES

28 U.S.C. section 1257(3) . . . . .	2
-------------------------------------	---



No. 96 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1996

---

---

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

---

---

Petitioner Angel J. Monge respectfully prays that a Writ of Certiorari issue to review the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997.

## OPINION BELOW

The Supreme Court of California issued its divided opinion in this case on August 26, 1997, reported as People v. Monge, \_\_\_ Cal.4th \_\_\_ (1997). A copy of that opinion is attached as Appendix A.

## JURISDICTION

The opinion of the California Supreme Court was filed on August 26, 1997. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Double Jeopardy guarantee of the Fifth Amendment to the United States Constitution and the Due Process guarantee of the Fourteenth Amendment.

In relevant part, the Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy . . . ."

The Fourteenth Amendment provides:

Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### STATEMENT OF THE CASE

In 1994 the California electorate enacted a habitual offender statute commonly referred to as the "three strikes" initiative. This law provided a minimum of a twenty-five year to life sentence for a defendant convicted of a felony if that defendant had two prior felonies which qualified as "strikes." It also provided for a sentence doubling if the defendant had one qualifying prior strike. Under state law, these increased penalties applied only when the state could prove to a jury beyond a reasonable doubt that the defendant's prior felonies involved the type of conduct specified in the habitual offender statute.

Here, the information charged appellant with the sale and possession of marijuana as well as having served a prior prison term. In addition, the information charged that appellant had suffered a prior serious felony conviction, a strike within the meaning of the three-strikes law then codified at Penal Code § 667 (b) - (i) and Penal Code § 1170.12 (a) - (d). In particular, the information charged that defendant had been convicted of an assault in which he had personally used a dangerous weapon.

Defendant pled not guilty on the substantive charges and, pursuant to state law, moved to bifurcate trial on the section 667 strike allegation. The motion was granted.

The jury found defendant guilty of the underlying substantive charges. At a bifurcated trial, the state presented its evidence to show that defendant had personally used a weapon during a prior offense. The prior conviction allegation was found true, as was the prior prison term allegation.

The court sentenced appellant on June 12, 1995, imposing a five year term for the underlying criminal charge. Because of the true finding on the prior conviction allegation, and pursuant to the mandatory terms of the state's three strikes law, the court then doubled that term to 10 years. See California Penal Code § 667(e)(1). Finally, the court added a one-year term for the prior prison term allegation.

On appeal, the state conceded that it had presented insufficient evidence to sustain the prior felony conviction allegation because it had failed to prove that defendant had used a weapon during the prior offense. The Court of Appeal agreed and struck the true finding on this allegation. Because the state had presented insufficient evidence to support this allegation, the appellate court held that Double Jeopardy precluded the state from retrying the allegation a second time.



The state sought review. The California Supreme Court granted review and, in a 4-3 decision, reversed. The seven justice state court was badly fractured on this issue. The decision generated three separate opinions; a three-justice plurality which held Double Jeopardy inapplicable, a short one-justice concurrence, and an exhaustive three-justice dissent which concluded that Double Jeopardy did indeed apply. Each of the three opinions accurately noted not only that this Court had, on several occasions, left this question open but that courts around the country had reached conflicting views on this exact question.

This Petition for Writ of Certiorari is taken from the decision of the California Supreme Court.

#### REASONS FOR GRANTING THE WRIT

In a line of cases culminating with United States v. DiFrancesco, 449 U.S. 117 (1980) this Court has held that the Double Jeopardy clause does not apply to traditional criminal sentencing proceedings. In a separate line of cases the Court has held that the Double Jeopardy clause does apply to certain criminal sentencing proceedings which have all the hallmarks of a trial on the question of guilt or innocence. See Arizona v. Rumsey, 467 U.S. 203 (1984); Bullington v. Missouri, 451 U.S. 430 (1981).

Both Bullington and Rumsey involved sentencing proceedings in capital cases. Thus, the question has arisen as to whether application of the Double Jeopardy clause is limited to formal trials in capital sentencing proceedings which have all the hallmarks of a trial or whether it also applies to formal trials in non-capital sentencing proceedings that have such hallmarks. This Court has, on several occasions, noted that this question remains unresolved.

In Lockhart v. Nelson, 488 U.S. 33, 37-38, n.6 (1988) the Court explicitly declined to decide whether the protection of the Double Jeopardy clause applied to trial like sentencing proceedings in non-capital cases. Similarly, in Caspari v. Bohlen, 510 U.S. 383, 397 (1994) the Court once again explicitly left the question open, concluding that "we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing . . . ." Caspari also noted that federal and state courts had "reached conflicting holdings on the issue." 510 U.S. at 395. Accordingly, the Court held that because reasonable jurists could -- and had -- differed on the question, the issue could not be resolved in federal habeas corpus proceedings under the new rule bar of Teague v. Lane, 489 U.S. 288 (1989).

Yet the issue has continued to arise in courts throughout the country. As this Court noted in Caspari, and as each of the opinions below in this case noted, there is a stark split of authority in the lower courts as to the proper approach to this issue. Indeed, prior to his retirement, Justice White called on the Court to grant certiorari for this very reason and resolve this split of authority. Hunt v. New York, 502 U.S. 964 (1991).

In this case, a sharply divided California Supreme Court has now added its voice to the fray, holding that the Double Jeopardy clause does not bar retrial on enhancement allegations on which the state has presented insufficient evidence during a first trial. Certiorari is appropriate for three separate, but related, reasons.

First, the sheer number of conflicting appellate decisions on this question shows that the issue is both an important and recurring one. Second, there is a stark split of authority as to whether the Double Jeopardy Clause applies to trial like sentence enhancements. As Justice White's opinion in Hunt suggests, resolution of this issue in a particular case should not depend on the fortuity of which jurisdiction a litigant happens to be in.

Finally, as Justice Kennedy has noted, when resolution of an important federal question in federal court is barred by the new rule doctrine of Teague v. Lane, 489 U.S. 288, it is appropriate to grant certiorari in a case which presents that issue on direct review. Spencer v. Georgia, 500 U.S. 960, 961 (1991). (Kennedy, J., concurring in the denial of certiorari). This case presents the very situation Justice Kennedy envisioned in Spencer; Caspari makes clear that federal review of this issue is precluded by Teague. As a practical matter, the only way for this Court to resolve the split of authority referred to in Caspari itself, as well as each of the principal opinions in this case, is to grant certiorari in a case which presents the issue on direct review.

This is just such a case. Certiorari is appropriate.

CERTIORARI MUST BE GRANTED TO RESOLVE A STARK SPLIT OF AUTHORITY THROUGHOUT THE NATION AND DECIDE WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS THE STATE MULTIPLE CHANCES TO PROVE THE TRUTH OF NON-CAPITAL SENTENCE ENHANCEMENTS IT WAS UNABLE TO PROVE AT A FIRST TRIAL.

The question presented in this case is whether the Double Jeopardy Clause applies to non-capital sentence enhancements which contain all the hallmarks of a trial on the question of guilt or innocence. The issue is squarely presented in this case because, as the opinions below recognized, trial on the prior conviction enhancement at issue here has every hallmark of trial.

For example, the three-justice plurality below recognized that the "trial at which a California jury determines the truth of a prior conviction allegation . . . has 'the hallmarks of the trial on guilt or innocence.'" People v. Monge, Slip. Op. at 10. The three-justice dissent agreed, noting that the "same 'hallmarks of the trial on guilt or innocence' apply to a trial on a sentence enhancement allegation." People v. Monge, Werdegard J. dissenting, Slip Op. at 31.

Both opinions are entirely correct. As with any criminal offense, the California Legislature has provided that defendants are entitled to formal notice of and arraignment on prior conviction charges. See Penal Code § 667, subdivisions (c) and (g); § 1025. Similarly, as with any criminal offense, the defendant is entitled to a formal adversarial trial



on the charges. This includes not only the right to confront and present evidence, but the right to a jury trial as well. See Penal Code §§ 969½, 1025, 1158; People v. Reed, 13 Cal.4th 217, 228 n.5 (1996); In re Yurko, 10 Cal.3d 857, 862-863 (1974). Indeed, unless a defendant moves to bifurcate trial on the prior conviction allegations, the trial will occur at the same time and in front of the same jury that is trying the underlying charged offenses. See People v. Braccamonte, 119 Cal.App.3d 644 (1981).

At this trial, the formal rules of evidence apply. People v. Meyers, 5 Cal.4th 1193, 1201 (1993). Moreover, defendants are entitled to a special verdict on each prior conviction alleged. See Penal Code § 1158. Finally, and perhaps of most importance, the prosecution must prove each element of a prior conviction allegation true "beyond a reasonable doubt." People v. Morton, 41 Cal.2d 536, 539 (1953). See also People v. Santamaria, 8 Cal.4th 903, 918 (1994); People v. Tenner, 6 Cal.4th 559, 566 (1993).

This constellation of protections -- particularly proof beyond a reasonable doubt -- is identical to that provided during the trial on guilt or innocence. In California, a prior conviction trial under the three strikes law is identical to the trial on guilt and innocence.

Thus, this case squarely presents the very issue this Court left open in both Lockhart v. Nelson, 488 U.S. at 37-38, n.6 and Caspari v. Bohlen, 510 U.S. at 397. To wit, "whether the Double Jeopardy clause applies to noncapital sentencing, or whether

[California's] persistent-offender scheme is sufficiently trial like to invoke double jeopardy protections . . . ." Caspari v. Bohlen, 510 U.S. at 397.

In the case below, the three-judge plurality noted that "other state courts and the federal circuit courts are divided as to whether the federal double jeopardy clause applies to [trial-like, non-capital sentencing] proceedings analogous to the one here." People v. Monge, Slip. Opn. at 14. The three-judge dissenting opinion also recognized that there was a split of authority throughout the country. People v. Monge, Werdegar, J. dissenting, Slip. Opn. at 23-31. This Court recognized the split of authority in Caspari, as did former Justice White in an opinion issued several years before Caspari. Caspari v. Bohlen, 510 U.S. at 395 (noting that federal and state courts have "reached conflicting holdings on the issue."); Hunt v. New York, 502 U.S. 964 (White, J. dissenting from a denial of certiorari).

The various observations as to the split of authority are also entirely correct. By way of example only, the highest courts of Colorado, Washington and Texas have all found that Double Jeopardy does apply to habitual offender schemes so long as they have all the hallmarks of a trial on the question of guilt or innocence. See State v. Hennings, 670 P.2d 256, 257-262 (Wash. 1983); Cooper v. State, 631 S.W.2d 508, 514 (Tex. 1982); People v. Quintana, 634 P.2d 413, 417-418 (Colo. 1981). Prior to Caspari -- which precluded federal courts from resolving the question under the new rule doctrine of Teague v. Lane -- the federal circuit courts in the Fifth, Eighth and Ninth circuits reached the same result. See, e.g., Durosko v. Lewis, 882 F.2d 357, 359 (9th Cir. 1989), cert. denied, 110 S.Ct. 1930;

Nelson v. Lockhart, 828 F.2d 446, 449-451 and n.7 (8th Cir. 1987), overruled on other grounds Lockhart v. Nelson 488 U.S. 33; Briggs v. Procunier, 764 F.2d 368, 372-373 (5th Cir. 1982); French v. Estelle, 692 F.2d 1021, 1023 (5th Cir. 1982), cert. denied 461 U.S. 937.

On the other hand, federal circuit courts in the Seventh and Tenth Circuits have reached a contrary conclusion, ruling that Double Jeopardy does **not** apply in this situation. Denton v. Duckworth, 873 F.2d 144 (7th Cir. 1989); Linam v. Green, 685 F.2d 369 (10th Cir. 1982). State courts in Missouri and Indiana have agreed with this conclusion. State v. Lee, 660 S.W.2d 394 (Mo. 1983); Durham v. State, 464 N.E.2d 321 (Ind. 1984).

In sum, there are three points which counsel in favor of a grant of certiorari. First, the question of whether double jeopardy applies to trial-like non-capital sentence enhancements has been, and continues to be, a recurring one in jurisdictions throughout the country. Virtually every jurisdiction has such enhancements.

Second, every court to address this issue -- including this Court -- has recognized that there is a sharp divergence of views on this question. The two principal opinions below reflect this very divergence. Uniformly, the lower courts have -- as in this case -- noted that this Court has not yet resolved the issue.

Third, in light of Caspari, this issue cannot be resolved in federal habeas corpus proceedings. Thus, the only way for this Court to resolve this split of authority, and finally put this divisive issue to rest, is to grant certiorari in a case which squarely presents the issue and comes to the Court on direct review.

This is just such a case. Certiorari is appropriate.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: 9/24/97.

Respectfully submitted,

GARDNER & DERHAM  
CLIFF GARDNER\*

  
By, Cliff Gardner

\*Counsel of Record

APPENDIX A



C O P Y

SUPREME COURT  
FILED

AUG 27 1997

Robert Wandruff Clerk

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S055881
v.	)	
	)	Ct. App. 2/3 B094905
ANGEL JAIME MONGE,	)	
	)	Los Angeles County
Defendant and Appellant.	)	Super. Ct. No. KA025876
	)	

In this case, we consider the applicability of the state and federal prohibitions against double jeopardy to a proceeding to determine the truth of a prior conviction allegation. We conclude that, in this noncapital case, the state and federal prohibitions against double jeopardy do not apply. Accordingly, we reverse the judgment of the Court of Appeal to the extent that judgment bars retrial of the prior conviction allegation on double jeopardy grounds.

FACTS AND PROCEDURAL BACKGROUND

During the afternoon of January 25, 1995, as Pomona Police Department undercover officers were driving an unmarked car on West Ninth Street in the City of Pomona, they spotted a 13-year-old boy standing near the curb. The boy motioned the officers to pull over, but instead they pulled into an alley that led to the rear of an apartment complex where police had earlier observed narcotics activity. Once in the carport area at the rear of the complex, the officers spotted defendant Angel Jaime Monge. Defendant approached the car, and one of the officers rolled down the window and asked where he could buy marijuana. Defendant did not answer, but

SEE CONCURRING AND DISSENTING OPINIONS

walked to a carport. The officers turned their car around and then noticed the young boy who had earlier motioned them to pull over, now standing some distance behind their car. Defendant returned and gave the boy several plastic bags. The boy then approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two \$10 bills for two plastic bags of marijuana. After leaving the alley, the officers reported the sale to other Pomona officers, who arrested defendant and the boy. Police searched defendant and found the two \$10 bills that the officers had given to the boy.

The District Attorney of Los Angeles County charged defendant with using a minor to sell marijuana (Health & Saf. Code, § 11361, subd. (a)), sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and possession of marijuana for sale (Health & Saf. Code, § 11359). The district attorney also alleged defendant had suffered a prior serious felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),<sup>1</sup> and a prior prison term within the meaning of section 667.5, subdivision (b). Specifically, the district attorney alleged a July 2, 1992, conviction and prison term for assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant pleaded not guilty and denied all sentencing allegations.

Defendant waived his right to a jury trial of the prior conviction and prior prison term allegations, and the court granted his request to bifurcate determination of those allegations. A jury found defendant guilty of the substantive charges. When proceedings reconvened the following week, the court asked defense counsel if defendant wanted to admit the prior conviction, and defense counsel said, "That's correct, Your Honor." The court then asked defendant if he understood, and defendant said, "Yes." After an off-the-record discussion, the court again asked if

<sup>1</sup> All further statutory references are to the Penal Code.

defendant wanted to admit the prior conviction, and defense counsel said, "No, he doesn't. He wishes the court to try the prior without the jury."

The prosecutor asserted that the prior assault conviction was a serious felony for purposes of the Three Strikes law. Defense counsel disagreed, arguing the weapon involved in the prior crime was not a deadly weapon. The court interrupted to point out that defendant had pleaded guilty to assault with "a deadly weapon" and thus had admitted the weapon was deadly. The court stated it would take judicial notice of the prior conviction and asked if the parties submitted the matter on that evidence alone. The prosecution then offered as additional evidence a "prison packet" (see § 969b) dated February 17, 1995, and an abstract of judgment. This additional evidence characterized defendant's prior conviction as "PC 245(a)(1) ADW GBI" and "ASLT W/DW (245(a)(1)PC)." Defense counsel submitted the matter after questioning whether the prosecution's documentary evidence, which included a photograph and fingerprints, related to defendant.

The court found true that defendant suffered a prior serious felony conviction, "[t]he felony being personal use of a deadly weapon in violation [of] section 245, 245(a)(1)." The court also found true the prior prison term allegation. The court imposed an eleven-year sentence, including five years for using a minor to sell marijuana, which the court doubled to ten years under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus a one-year enhancement for the prior prison term (§ 667.5, subd. (b)) and two years to run concurrently for possessing marijuana for sale. Under section 654, the court stayed the sentence for defendant's conviction of selling marijuana.

On appeal, defendant challenged the Three Strikes law as a violation of his right to due process. On its own motion, the Court of Appeal requested supplemental briefing on whether sufficient evidence supported the trial court's finding that defendant had suffered a prior serious felony conviction within the meaning of the Three Strikes law. Under the Three Strikes law, a prior felony conviction may affect

the sentence for the present offense if the conviction was of a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Of the felonies and categories of felonies listed in section 1192.7, subdivision (c), defendant's July 2, 1992, felony conviction might have qualified as a "serious felony" under either subdivision (c)(8), which refers to "any . . . felony in which the defendant *personally* inflicts great bodily injury on any person, other than an accomplice . . .," or subdivision (c)(23), which refers to "any felony in which the defendant *personally* used a dangerous or deadly weapon." (*Italics added.*)

The Court of Appeal affirmed defendant's conviction, but reversed the trial court's true finding on the prior serious felony allegation, holding the evidence insufficient to establish that defendant had acted personally. In addition, the Court of Appeal held that the state and federal constitutional protections against double jeopardy barred retrial of the prior serious felony allegation. Thus, the Court of Appeal remanded for resentencing.

We granted review in order to consider whether the state and federal prohibitions against double jeopardy apply to a proceeding, in a noncapital case, to determine the truth of a prior serious felony allegation.

#### DOUBLE JEOPARDY

##### *Federal Constitution*

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Among other things, this constitutional guaranty, known as the double jeopardy clause, "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 (*Pearce*), fn. omitted.) In *Benton v. Maryland* (1969) 395 U.S. 784, 796, the Supreme Court held that the double jeopardy prohibition was " 'fundamental to the American scheme of justice' " and therefore enforceable against the states as an element of the due process protection embodied in the Fourteenth Amendment. Nevertheless, the Supreme



Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions. We have on a few occasions noted and expressly declined to decide this question. (*People v. Valladoli* (1996) 13 Cal.4th 590, 608; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8; *People v. Saunders* (1993) 5 Cal.4th 580, 593.)

At the outset we emphasize that, in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions. In *Williams v. New York* (1949) 337 U.S. 241 (*Williams*), a jury convicted the defendant of first degree murder and recommended life imprisonment. (*Id.* at pp. 242-243.) The judge, however, sentenced the defendant to death after considering the evidence "in the light of additional information obtained through the court's 'Probation Department, and through other sources.'" (*Id.* at p. 242.) Among other things, the judge noted that the defendant had been involved in " 'thirty . . . burglaries in and about the same vicinity.'" (*Id.* at p. 244.) No court had ever convicted the defendant of these 30 burglaries, but "the judge had information that [the defendant] had confessed to some and had been identified as the perpetrator of some of the others." (*Ibid.*) The judge's rather informal fact-finding procedure was consistent with applicable New York law, which permitted the sentencing court to " 'seek any information that will aid the court'" (*id.* at p. 243), including information "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine" (*id.* at p. 245).

The United States Supreme Court upheld the sentence. The high court noted that the procedural protections applicable in a trial on guilt (notice of the charges, opportunity to cross-examine adverse witnesses, opportunity to offer evidence, and representation by counsel) traditionally have not applied at sentencing. (*Williams*,

*supra*, 337 U.S. at pp. 245-246.) Historically, the court pointed out, sentencing judges could even rely on their personal knowledge of a defendant. (*Id.* at p. 246.) The court concluded, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." (*Id.* at p. 251.)

The high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht v. Patterson* (1967) 386 U.S. 605, 606. Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner v. Florida* (1977) 430 U.S. 349), it has otherwise reaffirmed *Williams* as recently as last term. (*U.S. v. Watts* (1997) \_\_\_ U.S. \_\_\_, \_\_\_ [117 S.Ct. 633, 635]; see also *Witte v. U.S.* (1995) \_\_\_ U.S. \_\_\_, \_\_\_ [115 S.Ct. 2199, 2205] ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.'" ].)

Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations need not provide a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 274, 277; *People v. Wims* (1995) 10 Cal.4th 293, 304-306; *People v. Wiley*, *supra*, 9 Cal.4th at pp. 584-585, 589.) For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Though states need not provide a trial of sentencing allegations, the California Legislature has elected to grant defendants a statutory right to a jury trial of prior conviction allegations. Section 1025 provides: "[T]he question whether or not [a defendant] has suffered [a] previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose . . . ." A survey of our decisions indicates that we have expanded section 1025's bare grant of a jury trial to include various procedural guaranties. For example, we have stated in dictum that the prosecution must prove a prior conviction allegation beyond a reasonable doubt (*People v. Tenner* (1993) 6 Cal.4th 559, 566 (*Tenner*); *In re Yurko* (1974) 10 Cal.3d 857, 862) and that the accused enjoys the privilege against self-incrimination (*In re Yurko, supra*, 10 Cal.3d at p. 863, fn. 5). Similarly, we have held that the rules of evidence apply in these trials. (*People v. Reed* (1996) 13 Cal.4th 217, 224; *People v. Myers* (1993) 5 Cal.4th 1193, 1201.) Finally, we have stated that a defendant in a trial of a prior conviction allegation has a right to " 'be confronted with witnesses against him [and] to cross-examine' " those witnesses. (*People v. Reed, supra*, 13 Cal.4th at p. 228, fn. 6, quoting *Specht v. Patterson, supra*, 386 U.S. at p. 610; *In re Yurko, supra*, 10 Cal.3d at p. 863, fn. 5.) Arguably, the next step in the logical progression of these decisions is for us now to hold that the constitutional protections against double jeopardy apply. Constitutional law, however, does not grow inevitably by accretion; rather, each question rises or falls on its individual merits.

With this point in mind, we turn to an analysis of the double jeopardy clause of the federal Constitution. The double jeopardy clause by its terms proscribes a second jeopardy "for the same offense." (U.S. Const., 5th Amend., italics added.) The clause makes no express reference to sentencing determinations. Our review of the Supreme Court's decisions indicates that court is reluctant to apply the clause to sentencing determinations. In *Stroud v. United States* (1919) 251 U.S. 15 (*Stroud*), a jury found the defendant guilty of first degree murder " 'without capital

punishment,' " which was one of its options under the applicable statute. (*Id.* at pp. 17, 18.) After the Supreme Court reversed that judgment, a jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. (*Id.* at p. 17.) The Supreme Court held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the court did not consider the verdict of "guilty . . . 'without capital punishment' " as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." (*Id.* at p. 18.)

The Supreme Court reaffirmed *Stroud* in *Pearce, supra*, 395 U.S. at page 720. In *Pearce*, the court resolved two cases in which the defendants successfully challenged their convictions, only to receive longer overall sentences following retrials. Moreover, neither defendant received credit for time served. (*Id.* at pp. 713-715.) The Supreme Court held that the double jeopardy clause entitled the defendants to credit for time served. (*Id.* at pp. 718-719.) Nevertheless, the double jeopardy clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." (*Id.* at p. 719.)

In *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 23-24, in which the jury imposed the sentence instead of the judge, the Supreme Court, without discussion, again reaffirmed that the double jeopardy clause does not preclude a longer sentence following retrial. Finally, in *United States v. DiFrancesco* (1980) 449 U.S. 117 (*DiFrancesco*), the high court considered a statutory sentencing scheme that allowed the federal court of appeals to review the sentence that the federal district court had imposed and, at the prosecution's request, to increase that sentence "after considering the record" and "after hearing." (*Id.* at p. 120, fn. 2.) The high court determined that



this scheme did not violate the double jeopardy clause, noting that “[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal.” (*Id.* at p. 133.)

Thus, in a variety of contexts, the Supreme Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings. *Bullington v. Missouri* (1981) 451 U.S. 430 (*Bullington*) marked the first departure from this consistent approach.

*Bullington* concerned imposition of the death penalty under Missouri law. In accord with the Supreme Court’s decisions in *Furman v. Georgia* (1972) 408 U.S. 238, *Gregg v. Georgia* (1976) 428 U.S. 153, and the capital cases decided on the same day as *Gregg*, Missouri’s death penalty statute included intricate procedural safeguards. For example, the trial court had to conduct a separate presentence hearing for a defendant convicted of capital murder. The hearing had to be held before the same jury that found the defendant guilty. At the hearing, the jury considered additional evidence and determined whether any aggravating or mitigating circumstances existed, whether the aggravating circumstances warranted the death penalty, and whether the mitigating circumstances outweighed the aggravating circumstances. The jury had to make its findings beyond a reasonable doubt. Finally, the court had to instruct the jury that it need not impose the death penalty even if it found sufficient aggravating circumstances that mitigating circumstances did not outweigh. (*Bullington, supra*, 451 U.S. at pp. 433-435.)

A Missouri jury convicted Robert Bullington of capital murder. As required, the court held a presentence hearing, and the jury returned a verdict of “imprisonment for life without eligibility for probation or parole for 50 years.” (*Bullington, supra*, 451 U.S. at p. 436.) The trial court then granted Bullington’s motion for a new trial, finding error in jury selection. Despite the Supreme Court’s decision in *Stroud, supra*, 251 U.S. 15, the court also ruled, on double jeopardy grounds, that the prosecution could not seek the death penalty on retrial. (*Bullington, supra*, 451 U.S.

at p. 436.) The prosecution petitioned for a writ of prohibition or mandamus, and the state supreme court granted the writ, holding that double jeopardy principles did not bar the prosecution from seeking the death penalty. (*Id.* at pp. 436-437.) The United States Supreme Court reversed, holding that the double jeopardy clause did bar imposition of the death penalty. (*Id.* at pp. 446-447.) Noting that, under the applicable Missouri death penalty law, the jury determined the sentence at “a separate hearing” and did not have “unbounded discretion,” but rather chose “between two alternatives,” and that “the prosecution . . . undertook the burden of establishing certain facts beyond a reasonable doubt” (*id.* at p. 438), the high court reasoned that the penalty phase of a Missouri capital trial had “the hallmarks of the trial on guilt or innocence” (*id.* at p. 439) and therefore that the double jeopardy prohibition applied (*id.* at pp. 438, 446). The court reaffirmed *Bullington* in *Arizona v. Rumsey* (1984) 467 U.S. 203, 212, a case in which the judge, not the jury, determined the appropriate sentence.

On its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has “the hallmarks of the trial on guilt or innocence.” Thus, the defendant has a right to counsel, notice, and an opportunity to be heard. (*Oyler v. Boles* (1962) 368 U.S. 448, 452.) The prosecution must “plead and prove” the prior conviction allegation (§§ 667, subds. (c) and (g), 1170.12, subds. (a) and (e)) at a “trial” (§ 1025). The prosecution has the burden of proof beyond a reasonable doubt. (*Tenner, supra*, 6 Cal.4th at p. 566.) Finally, the trier of fact faces a choice between two alternatives. (§ 1158.) Nevertheless, for reasons we discuss below, we believe *Bullington*’s “hallmarks of the trial” analysis does not apply here.

Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania v. Goldhammer* (1985) 474 U.S. 28, the court reaffirmed that its decisions “‘clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.’” (*Id.* at p. 30, bracketed language in *Goldhammer*, italics



added.) Similarly, in *Caspari v. Bohlen*, the court noted that *Bullington* "was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari v. Bohlen* (1994) 510 U.S. 383, 392 (*Caspari*).) The court added: "*Goldhammer and Strickland* [v. *Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* was limited to capital sentencing." (*Caspari, supra*, 510 U.S. at p. 393.)

Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decisions interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected *at its option* to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial.

Furthermore, despite some common procedural protections, the sentencing proceeding here and that in *Bullington* are more unlike than alike. First, the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases. Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character. A section 1025 trial does not then require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances. Nor does a section 1025 trial allow the trier of fact to reject a longer sentence even if its factual determinations support the sentence. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here.

In deciding *Bullington*, the court reaffirmed the general rule that the double jeopardy clause does not apply to sentencing proceedings. (*Bullington, supra*, 451 U.S. at p. 438.) The court then carved out a narrow exception to this general rule. (*Ibid.*) The court did not overrule *Stroud, supra*, 251 U.S. 15, which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. (*Bullington, supra*, 451 U.S. at p. 446.) Most of those procedural safeguards are unique to death penalty determinations and simply do not apply here.

Second, the financial and emotional burden of the sentencing proceeding at issue in *Bullington* distinguishes *Bullington* from this case. The court in *Bullington* stressed that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." (*Bullington, supra*, 451 U.S. at p. 445.) By comparison, though a trial of prior conviction allegations is undoubtedly *important* to a defendant—possibly increasing a short prison term to a life term—the level of embarrassment, expense, and anxiety involved is not "equivalent to that faced . . . at the guilt phase" of the trial. (*Ibid.*) This lesser financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence.

The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which, like age or gender, is readily determinable from the public record. Moreover, when, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. Finally, a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often

it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in *Bullington*.

Even when, as here, the prior conviction trial involves some factual point relating to the prior crime, such as whether the defendant acted personally, the proceeding is not like "the trial on guilt" (*Bullington, supra*, 451 U.S. at p. 439), because the prosecution may only present evidence from the *record* of the prior conviction (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*)). The defendant, and any member of the public, can review that record before the prior conviction trial and accurately forecast the trial's outcome. When a trial, even a very important trial, is short and readily predictable in this way, the defendant suffers correspondingly less embarrassment, expense, and anxiety. Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. For these reasons, we conclude the financial and emotional burden of a prior conviction trial is minor as compared to a guilt trial. (Cf. *DiFrancesco, supra*, 449 U.S. at p. 136 ["The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him."].)

Third, the nature of the issues involved at the penalty phase of a capital trial distinguishes *Bullington* from this case. The sentence determination in a capital case necessarily depends on the specific facts of the defendant's present crime, as well as an overall assessment of the defendant's character. The evidence usually overlaps or supplements the evidence offered at the guilt phase of the trial. On the other hand, in

a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all. Like a trial in which the defendant's age or gender is at issue, the prior conviction trial merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant (*People v. Biggs* (1937) 9 Cal.2d 508, 512; *People v. Dutton* (1937) 9 Cal.2d 505, 507), even if a prior jury has rejected the allegation (*People v. Rice* (1988) 200 Cal.App.3d 647, 654-656). If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. (*Ibid.*) "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." (*Durham v. State* (Ind. 1984) 464 N.E.2d 321, 324.)

Given these distinctions, we do not believe *Bullington* requires application of the double jeopardy clause to all sentencing proceedings that have "the hallmarks of the trial on guilt or innocence." (*Bullington, supra*, 451 U.S. at p. 439.) Nevertheless, other state courts and the federal circuit courts are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here. Some courts conclude that, where the prior conviction determination involves a trial-like proceeding at which the prosecution has the burden of proving certain disputed facts, a negative finding is tantamount to an acquittal of the facts necessary to establish a longer sentence, and double jeopardy protections bar retrial. (See, e.g., *Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109, 113, *revd.* on other grounds in *Caspari, supra*, 510 U.S. at pp. 396-397; *Durosko v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368, 371; *People v. Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514; *State v. Hennings* (1983) 100 Wn.2d 379, 386-390 [670 P.2d 256, 259-262].) These courts, however, do not fully appreciate the unique nature and constitutional origins of capital sentencing proceedings as compared to



prior conviction proceedings. Accordingly, we find more persuasive those decisions involving noncapital sentencing proceedings in which courts found the federal double jeopardy clause did not apply. (See, e.g., *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1274 ["We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."]; *Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144, 148 ["We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376 [The habitual criminal proceeding "is an inquiry as to whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."]; *Durham v. State, supra*, 464 N.E.2d at p. 324 ["The habitual offender status . . . is a continuing status of a particular defendant . . . . The state may use this status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."]; *State v. Cobb* (Mo. 1994) 875 S.W.2d 533, 536 ["The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."]; *State v. Aragon* (1993) 116 N.M. 267, 271 [861 P.2d 948, 952] ["Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."]; cf. *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451, 456 ["[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."]; *U.S. v. Rodriguez-Gonzalez* (2d Cir. 1990) 899 F.2d 177, 181 ["Reliance on . . . *Bullington* is inapposite . . . since [that] case[] arose in the unique context of capital sentencing."]; *People v. Levin* (Ill. 1993) 623 N.E.2d 317, 325 ["We conclude that the separate

hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."]; *People v. Sailor* (1985) 65 N.Y.2d 224, 231-236 [480 N.E.2d 701, 708] ["[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender . . . ."]; but see *Perkins v. State* (Ind. 1989) 542 N.E.2d 549, 551-552 [overruling *Durham v. State, supra*, 464 N.E.2d 321, but relying on a clear misreading of *Lockhart v. Nelson* (1988) 488 U.S. 33, 37-38, fn. 6].)

Our conclusion finds some support in the high court's most recent discussion of the issue in *Caspari, supra*, 510 U.S. 383. In *Caspari*, as in this case, the state court of appeals reversed a sentence because the record contained insufficient evidence that the defendant was a "persistent offender." (*Id.* at pp. 386-387.) On remand, the prosecution offered additional evidence, and the trial court imposed the same sentence. The state court of appeals affirmed the sentence, concluding that the federal double jeopardy clause does not apply to sentencing proceedings and therefore did not bar retrial of the persistent offender issue. (*State v. Bohlen* (Mo. 1985) 698 S.W.2d 577, 578.) The defendant subsequently petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but the federal court of appeals reversed, holding that the double jeopardy clause does apply to noncapital sentencing proceedings. The Supreme Court granted certiorari. (*Caspari, supra*, 510 U.S. at pp. 387-388.)

In deciding *Caspari*, the Supreme Court applied *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*), which held that new rules of constitutional law do not generally apply retroactively so as to permit reopening of final convictions by way of habeas corpus petitions. The *Caspari* court reasoned that, if application of the federal double jeopardy clause to noncapital sentencing proceedings would constitute a "new constitutional rule of criminal procedure" that would "break[] new ground or

impose[] a new obligation on the States" (*Teague, supra*, 489 U.S. at pp. 299, 301 (plur. opn. of O'Connor, J.)), then the district court correctly denied the writ of habeas corpus. (*Caspari, supra*, 510 U.S. at p. 390.) The court noted its historic refusal to apply the double jeopardy clause to sentencing proceedings, with the only exception being capital sentencing proceedings such as the one at issue in *Bullington*. (*Caspari, supra*, 510 U.S. at pp. 391-392.) The court then compared sentencing proceedings in noncapital cases to those in capital cases. Noting that sentencing in a capital case is unique and that procedural safeguards apply in capital cases that do not apply in other cases (*id.* at pp. 392-393), the court concluded "that the [federal] Court of Appeals announced a new rule in this case" by extending *Bullington* to noncapital cases (*Caspari, supra*, 510 U.S. at p. 395). Accordingly, the defendant's sentence was " 'consistent with established constitutional standards' " as of the time the sentence became final (*Teague, supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.), quoting *Desist v. United States* (1969) 394 U.S. 244, 262-263 (dis. opn. of Harlan, J.)), and the federal court of appeals erred in directing the district court to grant the writ (*Caspari, supra*, 510 U.S. at pp. 396-397).

Given this conclusion, the high court declined to decide whether the double jeopardy clause applies to noncapital sentencing proceedings. (*Caspari, supra*, 510 U.S. at p. 397.) Nevertheless, the court confirmed that none of its decisions applies the clause in that context. Indeed, the court asserted that "a reasonable jurist reviewing our precedents" would not conclude otherwise. (*Id.* at p. 393.) Thus, though we do not know how the Supreme Court would resolve the issue now before us, we do know that, like the sentence imposed in *Caspari*, the sentence here is " 'consistent with established constitutional standards.' " (*Teague, supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)) Furthermore, *Caspari* highlights the basic flaw of the dissent's reasoning. The premise of the dissent is that *Bullington* requires application of the federal double jeopardy clause whenever a sentencing proceeding, whether capital or noncapital, has "the hallmarks of the trial on guilt or innocence."

(*Bullington, supra*, 451 U.S. at p. 439.) The Missouri persistent offender statutes at issue in *Caspari*, like section 1025, created a proceeding with all these "hallmarks," including proof beyond a reasonable doubt. (*Bohlen v. Caspari, supra*, 979 F.2d at pp. 112-113.) If the dissent's articulation of *Bullington*'s holding were correct, then the Court of Appeals' decision in *Caspari*, barring retrial of the persistent offender issue, would have constituted a straight application of established precedent. The high court would not have found that retrial was " 'consistent with established constitutional standards' " (*Teague, supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)), and the high court would not have concluded "that the Court of Appeals announced a new rule in this case." (*Caspari, supra*, 510 U.S. at p. 395.) In light of *Caspari*, *Bullington* simply does not dictate the result in this case.

Finally, the *Caspari* court suggested that, if faced with the issue, it would find the double jeopardy clause inapplicable to the sentencing determination involved here. "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence." (*Caspari, supra*, 510 U.S. at p. 396.)

In conclusion, we hold that the federal double jeopardy clause does not apply to the trial of the prior conviction allegation in this case.

Of course, in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, footnote 22, we applied double jeopardy protections to bar retrial of a sentence-enhancing allegation in a noncapital case, saying: "The jury's rejection [of the allegation] constituted an express acquittal on the enhancement and forecloses any retrial." In *Marks*, we relied primarily on the Court of Appeal decision in *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, which in turn relied on *People v. Henderson* (1963) 60 Cal.2d 482 and *People v. Collins* (1978) 21 Cal.3d 208.



*Henderson*, which we reaffirmed in *Collins*, held that, when a defendant successfully challenges his conviction, the state double jeopardy clause prohibits imposition of a greater sentence following retrial, thus preventing an “unreasonabl[e] impair[ment]” of “[a] defendant’s right of appeal from an erroneous judgment.” (*People v. Henderson, supra*, 60 Cal.2d at p. 497; see also *People v. Collins, supra*, 21 Cal.3d at p. 216; *People v. Hood* (1969) 1 Cal.3d 444, 459; *People v. Ali* (1967) 66 Cal.2d 277, 281.) Our reference in *Marks* to “an express acquittal on the enhancement” might suggest a broader holding than mere application of *Henderson* and its progeny, but because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 914, fn. 4 [stating the policy underlying *Henderson* as a reason for barring retrial of enhancements].)<sup>2</sup> Because we based our decision in *Marks* on an interpretation of the California Constitution that is not relevant here, *Marks* has no bearing upon our interpretation of the federal Constitution.

#### California Constitution

We must also determine whether the double jeopardy protection of the California Constitution bars retrial of the prior conviction allegation in this case. The state Constitution provides that “[p]ersons may not twice be put in jeopardy for the same offense.” (Cal. Const., art. I, § 15.) By comparison, the federal Constitution provides that “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.” (U.S. Const., 5th Amend.) The “California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants’ rights than that extended by the federal Constitution . . .” (*People v. Fields* (1996) 13 Cal.4th 289, 298.) Nevertheless, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, “‘cogent reasons must exist’” before we will construe the

Constitutions differently and “‘depart from the construction placed by the Supreme Court of the United States.’” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.)

The purpose behind the state and federal double jeopardy provisions is the same. Like decisions interpreting the federal double jeopardy clause, “[d]ecisions under the double jeopardy clause of the California Constitution . . . recognize the defendant’s interest in avoiding both the stress of repeated prosecutions and the enhanced risk of erroneous conviction.” (*People v. Fields, supra*, 13 Cal.4th at p. 298.) In certain contexts, this court has decided that, in furthering this purpose, the state double jeopardy clause provides greater protection than its federal counterpart. The rule, which we already discussed, protecting defendants from receiving a greater sentence if reconvicted after a successful appeal (see *People v. Collins, supra*, 21 Cal.3d at p. 216; *People v. Hood, supra*, 1 Cal.3d at p. 459; *People v. Ali, supra*, 66 Cal.2d at p. 281; *People v. Henderson, supra*, 60 Cal.2d at pp. 495-497) is one instance where we have interpreted the state double jeopardy clause more broadly than the federal clause. (Cf. *Pearce, supra*, 395 U.S. at pp. 719-721 [finding no violation of the federal double jeopardy clause under similar circumstances].) A second instance is the rule prohibiting retrial after the trial court has declared a mistrial without the defendant’s consent. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-718; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275-276; cf. *Gori v. United States* (1961) 367 U.S. 364, 365 [finding no violation of the federal double jeopardy clause under similar circumstances].)

Under the circumstances of the present case, we find no reason to construe the California Constitution to afford greater protection than the federal Constitution. As we described above, though the effect on a defendant’s sentence may be significant, the embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant’s present offense, not an allegation of a prior

<sup>2</sup> Whether *Marks* correctly applied the *Henderson* rule is not before us.



conviction. The trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable. We see no reason, in the present context, to interpret the state Constitution differently from the federal. (Cf. *People v. Saunders, supra*, 5 Cal.4th at p. 596.) Accordingly, we conclude that the double jeopardy provision of the state Constitution does not apply to the trial of the prior conviction allegation in this case. (Cf. *People v. Morton* (1953) 41 Cal.2d 536 [permitting retrial of a prior conviction allegation under facts similar to those here, but without discussing double jeopardy].)

#### CONCLUSION

We conclude that the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case. Of course, this conclusion raises numerous secondary issues. For example, the Court of Appeal's determination that the evidence was insufficient to prove defendant's prior conviction was of a serious felony is, at the very least, the law of this case. Thus, the prosecution would have to present additional evidence at a retrial of the prior conviction allegation in order to obtain a different result. What limitations might apply to this additional evidence (other than the limitations we identified in *People v. Reed, supra*, 13 Cal.4th 217, and *Guerrero, supra*, 44 Cal.3d 343), we do not decide, because the Court of Appeal did not address that issue. For the same reason, we express no opinion about whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints. Finally, we express no opinion about whether due process protections preclude the prosecution from retrying the prior conviction allegation. (Cf. *Pearce, supra*, 395 U.S. at pp. 723-724; *Blackledge v. Perry* (1974) 417 U.S. 21, 28-29.)

Because the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case, we reverse the judgment of the Court of Appeal to the extent it barred retrial of that allegation on double jeopardy grounds.

CHIN, J.

WE CONCUR:

GEORGE, C.J.  
BAXTER, J.

## THE PEOPLE v. ANGEL JAIME MONGE

S055881

## CONCURRING OPINION BY BROWN, J.

I concur in the result, although I would favor a more cautious approach. The double jeopardy clause has proven singularly difficult to apply and remains one of the most " 'misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion.' " (Westen & Drubel, *Toward a General Theory of Double Jeopardy* (1978) Sup.Ct. Rev. 81, 82, fn. 6.)

While acknowledging that its precedents could hardly be characterized as "models of consistency and clarity" (*Burks v. United States* (1978) 437 U.S. 1, 9), the United State Supreme Court has held the prosecution is not entitled to retrial when a conviction is reversed for insufficient evidence. (*Id.* at pp. 9-11.) The question in this case is whether the prosecution is similarly barred from retrying a prior-conviction-sentence enhancement allegation when the true finding is reversed for insufficient evidence.

This is a question the high court has never specifically addressed. (*Bullington v. Missouri* (1981) 451 U.S. 430, 445; *Caspari v. Bohlen* (1994) 510 U.S. 383, 397.) In *Bullington*, the court considered whether the double jeopardy clause barred the prosecution from seeking the death penalty on retrial following reversal of an earlier conviction imposing a lesser penalty. *Bullington* marked the first time the court had applied the double jeopardy clause to a sentencing determination. (*Bullington v. Missouri, supra*, at p. 438.)

*Bullington's* characterization of the first jury's decision to impose life imprisonment as an acquittal of " 'whatever was necessary to impose the death sentence' " (*Bullington v. Missouri, supra*, 451 U.S. at p. 445, quoting *State ex rel. Westfall v. Mason* (Mo.Sup.Ct. 1980) 594 S.W.2d 908, 922 (dis. opn. of Bardgett, C.J.)), is strongly reminiscent of the court's decision in *Green v. United States* (1957) 355 U.S. 184. In *Green*, the court held the double jeopardy clause barred retrial of a greater offense after the jury at the defendant's first trial convicted him of the lesser included offense. (*Id.* at p. 191.) In both settings, the failure of the prosecution to prove its greatest charge implicated a failure to prove the case-in-chief. Characterizing the failure of proof as an acquittal under these circumstances is fully consistent with the objectives of the double jeopardy clause in that it protects a defendant charged with a crime from being forced to "run the gantlet . . . on that charge" (*id.* at p. 190) more than once.

While the United States Supreme Court's cases have not "foreclosed the application of the Double Jeopardy Clause to noncapital sentencing" (*Caspari v. Bohlen, supra*, 510 U.S. at p. 393), none has applied the clause in that particular context, and the question remains unresolved. In the wake of *Bullington* and *Caspari* considerable confusion exists, but a few propositions seem clear. First, the double jeopardy clause does apply to some sentencing proceedings; second, where the clause applies, its sweep is absolute and there can be no balancing of the equities; and finally, application of double jeopardy does not depend on the mechanical application of a formula. It depends instead on the nature of the determination to be made and its relationship to the underlying offense.

As the court stated in *Caspari*: "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair, and will enhance the accuracy of the proceeding by



ensuring that the determination is made on the basis of competent evidence.”

(*Caspari v. Bohlen*, *supra*, 510 U.S. at pp. 396-397.)

Other jurisdictions have found the reasoning of *Bullington* inapplicable where the facts at issue in the sentencing determination have no bearing on facts relating to the present crime. (*Denton v. Duckworth* (7th Cir. 1989) 144, 148 [unlike death penalty determination in *Bullington*, habitual offender statute does not require consideration of facts underlying substantive offense]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 375 [same]; *People v. Sailor* (N.Y.App. 1985) 480 N.E.2d 701, 707 [*Bullington* implicitly recognizes death penalty was part of substantive offense of murder].)

When the prosecutor fails to prove a prior conviction allegation, a retrial does not require a factfinder to reevaluate the evidence underlying the substantive offense. Under these circumstances a retrial does not subject a defendant to the risk of repeated prosecution within the meaning of the double jeopardy clause.

BROWN, J.

C O P Y

PEOPLE v. MONGE

S055881

#### DISSENTING OPINION BY WERDEGAR, J.

I dissent. With due respect, I believe the majority fails to appreciate the import of the United States Supreme Court decisions touching on this difficult issue, especially the meaning of *Bullington v. Missouri* (1981) 451 U.S. 430 (hereafter sometimes *Bullington*). As I explain, *Bullington* and its progeny compel a conclusion that the federal double jeopardy clause precludes the People from retrying the prior felony conviction allegation in this case. Moreover, even assuming the federal double jeopardy clause does not apply here, I conclude the double jeopardy clause of the state Constitution (Cal. Const., art. I, § 15) protects Californians from multiple retrials of sentence enhancement allegations, at least as the statutory law concerning such enhancement allegations is now written.

#### I. DOUBLE JEOPARDY UNDER THE FEDERAL CONSTITUTION

As the majority correctly recognizes, “the Supreme Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions.” (Lead opn., *ante*, p. 5; conc. opn. of Brown, J., *ante*, p. 1 [“This is a question the high court has never specifically addressed.”].) The persuasive force of this observation, however, is diminished by the fact the high court also has never held the reverse, i.e., it has never held the double



jeopardy clause is *inapplicable* to all noncapital sentencing proceedings. Just as we have avoided resolving this issue (*People v. Valladoli* (1996) 13 Cal.4th 590, 608 [assuming without deciding double jeopardy protections apply to prior conviction enhancement allegations]; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8 [need not decide the issue]), the United States Supreme Court has similarly managed to avoid a definitive decision on the issue. The most recent example of this avoidant behavior is *Caspari v. Bohlen* (1994) 510 U.S. 383 (hereafter *Caspari*), in which the high court explained that “[b]ecause of our resolution of this case on Teague<sup>1</sup> grounds, we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing . . . .” (*Caspari*, *supra* at p. 397 [127 L.Ed.2d at p. 250]; see also *Lockhart v. Nelson* (1988) 488 U.S. 33, 37, fn. 6 [because state conceded the issue, court “assume[d], without deciding” double jeopardy applied to noncapital sentencing proceedings]; *Hunt v. New York* (1991) 502 U.S. 964 (opn. by White, J. dis. from den. of cert.) [arguing high court should grant certiorari to resolve split in authority concerning the “key question . . . whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in noncapital cases”].) As I explain, although the slate is not entirely a clean one, the majority misapprehends the importance of *Bullington*, *supra*, 451 U.S. 430, and its progeny.

I begin with first principles. The Fifth Amendment provides: “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . .” This provision was made applicable to the states through the Fourteenth Amendment by the Supreme Court’s decision in *Benton v. Maryland* (1969) 395 U.S. 784. The federal double jeopardy clause “protects against a second

<sup>1</sup> See *Teague v. Lane* (1989) 489 U.S. 288, governing the retroactivity of newly-announced rules to cases proceeding via habeas corpus in the federal courts.

prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717, fn. omitted.) “The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” (*Green v. United States* (1957) 355 U.S. 184, 187-188.)

The general rule is that the federal double jeopardy prohibition does not operate to prevent a retrial following reversal of the judgment on appeal. (*North Carolina v. Pearce*, *supra*, 395 U.S. at pp. 719-720; *United States v. Tateo* (1964) 377 U.S. 463, 465.) An important exception to this general rule, however, applies when the judgment is reversed for insufficient evidence. (*Burks v. United States* (1978) 437 U.S. 1 [hereafter *Burks*].) In such cases, retrial is barred by the federal double jeopardy clause because “the prosecution . . . has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government’s case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury’s verdict of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.” (*Id.*, at p. 16.) Inasmuch as *Burks* delineates the scope of federal constitutional law, we have consistently followed the rule set forth in that case. (See *People v. Trevino* (1985) 39 Cal.3d 667, 694-699, disapproved on another ground, *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1221; *People*

v. *Belton* (1979) 23 Cal.3d 516, 526-527 & fn. 13; see generally 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 319(b), pp. 368-369 ["The *Burks* rule has been adhered to by the California courts"].)

The Court of Appeal in this case reversed the jury's finding on the alleged prior serious felony conviction, explaining the People failed to produce sufficient evidence defendant personally inflicted great bodily injury or personally used a weapon in the prior crime. This was not a reversal for mere trial error such as the erroneous admission or exclusion of evidence at trial. Instead, the appellate court's action was a reversal for insufficient evidence. If the federal double jeopardy clause applies to sentence enhancements generally, or to the particular enhancement at issue in this case (i.e., Pen. Code, §§ 667, subds. (b)-(i) [legislative "Three Strikes" law], 1170.12, subds. (a)-(d) [initiative "Three Strikes" law]), the *Burks* rule would prohibit retrial of the enhancement allegation. The lead opinion reasons the *Burks* rule does not apply, finding the federal double jeopardy clause inapplicable to sentencing hearings unless the death penalty is involved. As I explain, the lead opinion's reading of applicable Supreme Court precedent is flawed.

The lead opinion is correct that double jeopardy protections do not apply to traditional criminal sentencing proceedings. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*United States v. DiFrancesco* (1980) 449 U.S. 117, 133 [hereafter *DiFrancesco*].) Most recently, the high court explained that "[t]raditionally, '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.' *Nichols v. United States*, 511 U.S. 738, 747; 128 L.Ed.2d 745[, 754] (1994). We explained in *Williams v. New York*, 337 U.S. 241, 246 (1949), that 'both before and since the American colonies became a nation, courts

in this country and in England practiced a policy under which a sentencing judge could exercise wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' " (*Witte v. United States* (1995) 515 U.S. 389, 397-398 [132 L.Ed.2d 351, 362-363].) "Against this background of sentencing history, we specifically have rejected the claims that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime." (*Id.*, at p. 398 [132 L.Ed.2d at p. 363].)

We, of course, have such "traditional" sentencing proceedings in California. Following the jury's verdict, the trial court must set a hearing within 20 judicial days of verdict for pronouncement of judgment. (Pen. Code, § 1191.) At this hearing, the trial judge considers the probation report (see Cal. Rules of Court, rules 411 [presentence investigations and reports], 411.5 [probation officer's presentence investigation report]) and exercises broad discretion in deciding whether probation is justified as a sentencing option (*id.*, rule 414 [criteria affecting probation]), in selecting the base term (*id.*, rule 420) and in choosing whether to impose concurrent or consecutive terms (*id.*, rule 425 [criteria affecting concurrent or consecutive sentences]). In making these determinations, the trial judge considers the circumstances in aggravation (*id.*, rule 421) and in mitigation (*id.*, rule 423), which need not be either pleaded or proved by the People. (See generally, *People v. Hernandez* (1988) 46 Cal.3d 194, 204-206 [noting difference between "a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed"]; *People v. Betterton* (1979) 93 Cal.App.3d 406 ["full panoply of rights" not required in sentencing hearing]; *People v. Thomas* (1979) 87 Cal.App.3d 1014 [Cal. Rules of Court intended to guide sentencing



courts, not give notice of prohibited acts].) In most cases, the number of potential sentencing dispositions and permutations is great, as is the discretion of the sentencing judge. Such "traditional" sentencing proceedings are not at issue in this case, and I agree double jeopardy principles do not apply to proceedings of this type.

As is apparent, "traditional" sentencing proceedings are held without a jury, permit consideration of probation reports and involve broad sentencing court discretion to choose among a variety of outcomes. Such hearings must be distinguished from the type of criminal sentencing hearing that follows the trial on the substantive criminal offenses and is addressed typically (but not exclusively) to the existence of enhancements. In this latter type of hearing, formal notice of the sentence enhancement allegation must be given, a jury determines historical facts that can lead to enhanced or longer sentences, the People bear the burden of proof beyond a reasonable doubt by admissible evidence, and the sentencer must choose one of two outcomes. This latter type of sentencing hearing constitutes a separate trial or a "trial-like" proceeding on punishment. As I explain, the lesson of *Bullington v. Missouri*, *supra*, 451 U.S. 430, and its progeny is that in such cases, federal double jeopardy protections apply.

#### A. *Bullington* and its Progeny

*Bullington* involved a defendant convicted in Missouri of capital murder. Under Missouri law, the defendant in *Bullington* was entitled to a separate presentence hearing on the question of penalty. State law guaranteed him the following procedural rights at that hearing: the same jury that found him guilty of murder would hear additional evidence; notice of the aggravating evidence must be given; the jury must consider 10 aggravating and 6 mitigating factors specified by law; the jury must weigh the various factors and identify in writing which factors it found proved beyond a reasonable doubt; the jury must find that the

aggravating evidence warrants imposition of the death penalty beyond a reasonable doubt; and the jury's decision must be unanimous. (*Bullington*, *supra*, 451 U.S. at pp. 433-434.) After a presentence hearing, the jury eschewed the death penalty and imposed on the defendant a sentence of life with no parole for 50 years.

The defendant in *Bullington* then moved for judgment of acquittal or for a new trial. When the trial court granted the new trial motion, the prosecution announced its decision that, during the retrial, it would again seek the death penalty. The defendant objected, citing the federal double jeopardy clause, and the high court agreed. The Supreme Court first noted that it "has resisted attempts to extend [double jeopardy principles] to sentencing. The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." (*Bullington*, *supra*, 451 U.S. at p. 438.) For this proposition, the high court cited the cases on which the lead opinion relies, i.e., *North Carolina v. Pearce*, *supra*, 395 U.S. 711, *DiFrancesco*, *supra*, 449 U.S. 117, *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, *Stroud v. United States* (1919) 251 U.S. 15 (hereafter *Stroud*).

The *Bullington* court declined, however, to follow this line of reasoning. Because its explanation for diverging from the previous rule is critical to this case, I quote it extensively:

"The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner *Bullington* at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was *not given unbounded discretion* to select an appropriate punishment from a



wide range authorized by statute. Rather, *a separate hearing was required* and was held, and the jury was presented both a *choice between two alternatives and standards to guide the making of that choice*. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the *burden of establishing certain facts beyond a reasonable doubt* in its quest to obtain the harsher of the two alternative verdicts. *The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.*

"In contrast, the sentencing procedures considered in the Court's previous cases *did not have the hallmarks of the trial on guilt or innocence*. In *Pearce*, *Chaffin* and *Stroud*, there was no separate sentencing proceeding at which the prosecution was required to prove — beyond a reasonable doubt or otherwise — additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud*, no standards had been enacted to guide the jury's discretion. In *Pearce*, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in *Chaffin*, the discretion given to the jury was extremely broad. That defendant, convicted in Georgia of robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. [Citation.] The statute contained no standards to guide the jury's exercise of its discretion." (*Bullington, supra*, 451 U.S. at pp. 438-440, italics added, fns. omitted.)

"In the usual sentencing proceeding, however, it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' In the normal process of sentencing, 'there are virtually no rules or tests or standards — and thus no issues

to resolve. . . .' M. Frankel, *Criminal Sentences: Law Without Order* 38 (1973). Thus, '[t]he discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance. Where the judge has power to select a term of imprisonment within a range the exercise of that authority is left fairly at large.' Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv.L.Rev. 904, 916 (1962)." (*Bullington, supra*, 451 U.S. at pp. 443-444, fn. omitted.)

- "By enacting a capital sentencing procedure *that resembles a trial on the issue of guilt or innocence*, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' . . . [W]e therefore refrain from extending the rationale of *Pearce* to the very different facts of the present case. Chief Justice Burger, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.' 594 S.W.2d, at 922. We agree." (*Bullington, supra*, 451 U.S. at pp. 444-445, italics added.) "Having received 'one fair opportunity to offer whatever proof it could assemble,' [citation], the State is not entitled to another." (*Id.*, at p. 446, quoting *Burks, supra*, 437 U.S. at p. 16.)

As is clear, the high court found *Bullington* distinguishable from prior cases because of the nature of the sentencing proceeding involved. Unlike past cases, the separate sentencing proceeding in *Bullington* bore "the hallmarks of the trial on guilt or innocence" (451 U.S. at p. 439), including the right to a jury, notice to the defendant of the facts to be proved, the submission of evidence and presentation of argument, a sentencing choice between two alternatives, circumscribed discretion with standards to guide such discretion, and a requirement of jury unanimity and of proof beyond a reasonable doubt.

The Supreme Court followed *Bullington* three years later in *Arizona v. Rumsey* (1984) 467 U.S. 203 (hereafter *Rumsey*). In *Rumsey*, the defendant was convicted of armed robbery and first degree murder. The trial judge, without a jury, found no aggravating circumstances present and thus determined the appropriate sentence under state law was life imprisonment without the possibility of parole for 25 years. On appeal, the Arizona Supreme Court found the trial judge had been mistaken in concluding no aggravating circumstance existed and remanded for a new sentencing hearing. Following the new hearing, the trial judge sentenced the defendant to the death penalty. On appeal once again, the defendant in *Rumsey* claimed imposition of the death sentence on retrial violated the federal double jeopardy clause as interpreted in *Bullington, supra*, 451 U.S. 430. The state supreme court agreed and reduced the sentence to life imprisonment.

The United States Supreme Court granted Arizona's petition for a writ of certiorari and affirmed. The high court explained that "[t]he capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer — the trial judge in Arizona — is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision *guided by detailed statutory standards* defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance and no mitigating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves *the submission of evidence and the presentation of argument*. The *usual rules of evidence govern the admission of evidence* of aggravating circumstances, and *the*

*State must prove the existence of aggravating circumstances beyond a reasonable doubt*. [Citations.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri. [Citation.]" (*Rumsey, supra*, 467 U.S. at pp. 209-210, italics added.)

The court in *Rumsey* thus underscored *Bullington's* core holding that the federal double jeopardy clause will apply to sentencing proceedings when such proceedings bear "the hallmarks of the trial on guilt or innocence" (*Bullington, supra*, 451 U.S. at p. 439). Stated differently, we must ask whether the sentencing proceeding involves characteristics "that make it resemble a trial for purposes of the Double Jeopardy Clause." (*Rumsey, supra*, 467 U.S. at pp. 209-210.) Despite the high court's analysis in both *Bullington* and *Rumsey*, the majority declines to follow the teaching of those cases. As I explain, the majority's approach is analytically insupportable.

#### B. Attempts at Distinguishing *Bullington* are Unpersuasive

The lead opinion acknowledges the existence of *Bullington, supra*, 451 U.S. 430, and its progeny, as well as that case's "hallmarks of the trial on guilt or innocence" analysis. (See lead opn., *ante*, p. 10.) The opinion declines to apply that analysis because it finds this case is distinguishable from *Bullington* and, accordingly, "*Bullington's* . . . analysis does not apply here." (Lead opn., *ante*, p. 10.) First, the lead opinion contends the Supreme Court has suggested it would not apply *Bullington* to noncapital sentencing hearings. (Lead opn., *ante*, p. 10.) Second, aside from any perceived direction from the Supreme Court, the lead opinion finds it significant that "many of the procedural protections that apply in a [Penal Code] section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) Additionally, the lead opinion finds the procedures applicable to capital cases "find no parallel" in noncapital cases (*ibid.*);



the degree of mental anguish faced by a criminal defendant subject to multiple prosecutions of enhancement provisions is insufficient to warrant double jeopardy protection (*id.*, p. 12); and capital sentencing proceedings are distinguishable because they rely on proof of facts linked to the facts of the substantive crimes (*id.*, pp. 13-14; see also conc. opn. of Brown, J., *ante*, p. 3).

As I explain, any suggestions from the high court in post-*Bullington* cases are, at most, ambiguous. Nothing in *Bullington* itself suggests its analysis is limited to capital cases; more importantly, no Supreme Court case has ever held *Bullington* and its progeny are so limited. In addition, the distinction drawn by the lead opinion between statutory and constitutional protections is wholly unsupported; indeed, *Bullington* itself involved statutory procedural protections not mandated by the federal Constitution. Finally, the lead opinion's attempt to distinguish *Bullington* and this case on their respective facts is wholly unpersuasive.

#### *1. The Supreme Court has Never Held Bullington is Limited to Capital Cases*

The lead opinion asserts "the high court in subsequent cases *has suggested* that *Bullington* does not apply to noncapital cases." (Lead opn., *ante*, p. 10, italics added; but see conc. opn. of Brown, J., *ante*, p. 2 [noting "this question remains unresolved"].) Any such "suggestion," of course, would not bind this court, which has an independent constitutional obligation to adjudicate the constitutional rights of litigants before it. Moreover, the two cases the lead opinion cites as making this "suggestion," *Caspari, supra*, 510 U.S. 383, and *Pennsylvania v. Goldhammer* (1985) 474 U.S. 28 (per curiam) (hereafter *Goldhammer*), are readily distinguishable.

In *Caspari, supra*, 510 U.S. 383, the high court confronted an Eighth Circuit Court of Appeals decision applying the *Bullington* analysis, in the context

of a Missouri state prisoner's habeas corpus petition, to conclude prior felony convictions under Missouri's persistent offender statutes were subject to federal double jeopardy protections; thus, a state appellate court's reversal of the finding the petitioner was a persistent offender, due to insufficient evidence of the charged priors, barred retrial of the enhancement. (*Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109.) The high court did not directly address the merits of this holding; instead, the court discussed whether the Eighth Circuit's decision applying double jeopardy protection to sentencing in a noncapital case was a new rule of law requiring prospective application only. (*Teague v. Lane, supra*, 489 U.S. 288.) It was in this context the Supreme Court noted that "Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari, supra*, at p. 392 [127 L.Ed.2d at p. 247].)

The *Caspari* court did not "hold" *Bullington* was limited to capital cases. Rather, it made the observation noted above merely to support its conclusion that "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari, supra*, 510 U.S. at p. 393 [127 L.Ed.2d at p. 248].) Noting that federal and state courts had "reached conflicting holdings on the issue" (*id.*, at p. 395 [127 L.Ed.2d at p. 249]), the court concluded "that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree'" (*ibid.*); accordingly, under *Teague v. Lane*, the Eighth Circuit erred in applying its ruling retroactively to defendant's benefit. Significantly for our purposes, the Supreme Court concluded its opinion in *Caspari* by stating: "we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing, or whether Missouri's persistent offender scheme is

sufficiently trial-like to invoke double jeopardy protections.” (*Caspari, supra*, at p. 397 [127 L.Ed.2d at p. 250], italics added.) As is clear, therefore, *Caspari* did not “hold” *Bullington* was limited to capital cases; more to the point, neither did the high court “suggest” it would so hold in the future. The court held only that it had not previously found *Bullington* applicable to noncapital cases, and so the Eighth Circuit’s decision to do so for the first time in the context of a final conviction challenged by way of a petition for federal habeas corpus was improper.

*Goldhammer, supra*, 474 U.S. 28, presents similarly unimpressive evidence of a “suggestion” the high court would limit *Bullington* to capital cases. In that case, a per curiam opinion decided on summary disposition, the issue was whether, following a successful appeal by a defendant as to 34 of 112 counts of theft and forgery, the state was entitled to a remand for resentencing on other counts for which sentencing had been suspended. In other words, the case did not concern sentence enhancement proceedings, capital or otherwise. In a passage quoting *DiFrancesco, supra*, 449 U.S. at page 134, *Goldhammer* noted: “the decisions of this Court ‘clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.” (*Goldhammer, supra*, 474 U.S. at p. 30, italics added, brackets in original.)

It would be a mistake to draw any significant inferences from the bracketed phrase. *DiFrancesco* was decided one year before *Bullington* and, at that time, the general rule was indeed that the high court’s “decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal.” (*DiFrancesco, supra*, at p. 134.) The Supreme Court in *Goldhammer* no doubt simply added the bracketed phrase to adjust the quotation to take into account the holding of *Bullington*. At the time *Goldhammer* was decided (1985), as now, the only two cases in which the high court has found

a sentencing proceeding subject to the double jeopardy clause have been capital cases. (*Bullington, supra*, 451 U.S. 430; *Rumsey, supra*, 467 U.S. 203.) As we have explained, however, those cases did not *turn* on the fact the death penalty was involved.

*Caspari, supra*, 510 U.S. 383, and *Goldhammer, supra*, 474 U.S. 28, thus provide weak evidence at best for discerning whether the Supreme Court would apply *Bullington*’s analysis to a noncapital case. Moreover, if we are attempting to predict what the high court *would hold* (as opposed to what it *has held*), we must also consider *Lockhart v. Nelson, supra*, 488 U.S. 33, a case involving a hearing to determine noncapital sentence enhancements based on prior felony convictions. The *Lockhart* court “assume[d], without deciding,” the double jeopardy clause applied to such proceedings. (*Id.*, at p. 37, fn. 6.) If the Supreme Court was of the opinion that *Bullington* was limited to capital proceedings, here was an opportunity to say so. If the court felt the double jeopardy clause was wholly inapplicable to sentencing proceedings not involving the death penalty, no reason appears to have decided *Lockhart* at all.

In any event, even assuming for argument *Caspari* and *Goldhammer* contain a “suggest[ion]” (lead opn., *ante*, p. 10) that the Supreme Court would not now apply the federal double jeopardy clause to noncapital sentencing proceedings, the simple fact is the high court has never actually “held” *Bullington* and *Rumsey* are so limited. Until directed otherwise by a definitive ruling, we are not bound by perceived “suggestions” in Supreme Court case law. We must decide the case before us based on constitutional principles, not predictions of what another court — even a higher court — may do if faced with a justiciable controversy. The Supreme Court having never held *Bullington* and *Rumsey* to be limited to capital cases, I would follow what several courts from around the country have done (see, e.g., *Bohlen v. Caspari, supra*, 979 F.2d 109, 113, *revd.*



on other grounds in *Caspari*, *supra*, 510 U.S. 383; *Durosko v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *People v. Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514 (hereafter *Cooper*); *State v. Hennings* (Wn.2d 1983) 670 P.2d 256, 259-262 (hereafter *Hennings*) and apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to this noncapital case to determine whether the federal double jeopardy clause applies here.

**2. It is Irrelevant that Defendant's Procedural Protections are Statutory Rather Than Constitutional**

The lead opinion next asserts it is "relevant" that "many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) It is true that many of a criminal defendant's procedural rights in a trial of sentence enhancement allegations find their origins in either a statute or a decision of this court, and not in the federal Constitution. For example, a trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon* (1994) 9 Cal.4th 69), and, whether or not the trial is bifurcated, the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancements must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c), 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court (Pen. Code, § 1025; see also Pen. Code, § 969½ [when prior conviction allegation is added to complaint after defendant has pleaded guilty, he must be arraigned on the allegations]). The People bear the burden of proving the sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable-doubt to "criminal actions"].)

Despite the nonconstitutional origins of these procedural protections, however, it is the lesson of *Bullington*, *supra*, 451 U.S. 430, that when a state erects a system in which sentence-enhancing facts are adjudicated in a hearing bearing "the hallmarks of the trial on guilt or innocence" (*id.*, at p. 439), the federal double jeopardy clause applies. Nothing in *Bullington* or its progeny suggests this analysis is dependent on whether the applicable procedural protections are constitutionally mandated. *Indeed, in Bullington itself, the state of Missouri required procedural protections for its capital defendants that were not grounded in the federal Constitution.* For example, Missouri law provided the jury must both designate in writing which aggravating factors it found true (Mo.Rev.Stat. § 565.012.4 (1978)) and apply a beyond a reasonable doubt standard to proof of those factors (*ibid.*; see *Bullington*, *supra*, 451 U.S. at p. 434). Neither procedural requirement is constitutionally mandated. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.) The lead opinion fails to account for this aspect of *Bullington*.

Accordingly, the lead opinion is simply wrong in claiming the constitutional nature of the protections involved is "relevant" (lead opn., *ante*, p. 11) to determining whether *Bullington*'s analysis should apply here. Whether or not the procedural protections offered by a state for the adjudication of sentence-enhancing facts are constitutionally mandated is simply not a relevant consideration to the question before us.

**3. Bullington is Not Distinguishable from the Present Case**

The lead opinion next asserts that, any perceived "suggestion" in post-*Bullington* decisions aside, *Bullington* is substantively different from the present case, because it involved the death penalty, and "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.) The lead opinion also finds *Bullington* distinguishable

due to "the unique nature . . . of capital sentencing proceedings as compared to prior conviction proceedings." (Lead opn., *ante*, p. 15.) The lead opinion fails, however, to identify any persuasive reasons, in law or logic, why *Bullington* can or should be limited to capital cases.

Death is indeed different, for the state's execution of a human being as a penal sanction is both final and irreversible, modern society's most serious criminal penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (opn. of Burger, C.J.) [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plur. opn. by Stevens, J.) [because of finality and severity of the death penalty, "it is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].) For purposes of double jeopardy and applying *Bullington*, however, simply labeling the death penalty as "unique" or "different" obscures the pertinent inquiry, namely, in what relevant way is the death penalty different for purposes of double jeopardy?<sup>2</sup>

Significantly, the *Bullington* court itself did not rely on the mere fact the death penalty was involved. Indeed, it declined to overrule *Stroud*, *supra*, 251 U.S. 15, a capital case in which a defendant, initially sentenced to life imprisonment, was sentenced to suffer the death penalty on retrial following a reversal and a new trial. The *Stroud* court found no double jeopardy prohibition against imposing the death penalty on retrial. Had *Bullington* held capital cases

<sup>2</sup> As Justice Oliver Wendell Holmes observed, frequent repetition of an idea does not necessarily add to its logical force. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (*Hyde v. United States* (1912) 225 U.S. 347, 391 (dis. opn. of Holmes, J.).)

per se were different, it should have overruled *Stroud*. Instead, *Bullington* distinguished *Stroud* as a case in which the penalty trial — unlike the one in *Bullington* — was not one "like the trial on the question of guilt or innocence." (*Bullington*, *supra*, 451 U.S. at p. 446.) "In *Stroud*, no standards had been enacted to guide the jury's discretion." (*Bullington*, *supra*, 451 U.S. at p. 439.) As the Supreme Court of Washington recognized: "Although *Bullington* involved the death penalty sentencing provision, neither the reasoning nor the holding in that case depends upon the presence of the death penalty." (*Hennings*, *supra*, 670 P.2d 256, 260.) Clearly the mere presence of the death penalty is not the key here.

Nor can we say the trial-like procedures that governed Missouri's capital sentencing proceedings are different in any meaningful way from the procedures governing the bifurcated sentencing proceeding used to determine the truth of the prior felony conviction allegation here. In both types of proceedings, the defendant may obtain a separate hearing, must be notified of what the People plan to prove, and is entitled to a jury and to counsel. In both types of proceedings, the trier of fact is guided by established standards and must choose one of two alternative verdicts. In the Missouri proceeding, the choices are death or life imprisonment without parole for 50 years. In the hearing in this case, the jury must decide whether the alleged prior conviction is true or untrue. Like the Missouri capital presentence hearing, the People in the present case are required to prove the alleged sentence enhancement beyond a reasonable doubt. As *Bullington* stated, "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment . . . ." (*Bullington*, *supra*, 451 U.S. at p. 438.) Stated differently, the hearing on the prior felony conviction allegations bore "the hallmarks of the trial on guilt or innocence." (*Id.*, at p. 439.)



Accordingly, the trial-like procedures that govern Missouri's capital sentencing hearing are nearly identical to those that apply to the bifurcated proceeding held in this case to determine defendant's prior felony convictions. I thus cannot agree with the lead opinion's contrary conclusion that Missouri's capital procedures "find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.)

The lead opinion also reasons that whereas *Bullington* held the relative level of embarrassment and anxiety a capital defendant would feel in facing a penalty phase trial was sufficiently comparable to the mental anguish suffered by a criminal defendant in the substantive guilt phase of a criminal trial (*Bullington*, *supra*, 451 U.S. at p. 445), the same cannot be said for a defendant facing a noncapital sentencing hearing. (Lead opn., *ante*, p. 12.) From this assessment of the emotional content of the trial experience, the lead opinion concludes *Bullington* should not be extended to noncapital sentencing proceedings.

What is missing from this discussion is a persuasive rationale supporting the bald assertion that a criminal defendant's "anxiety and insecurity" when facing a possible life sentence as a result of past crimes is not equivalent to that experienced by a defendant being tried for a substantive criminal offense. In this era of "Three-Strikes-and-You're-Out," the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial. Such prior convictions, if two or more are sustained, can lead to a *minimum* term in prison of twenty-five-years-to-life, with a maximum term consisting of the balance of the defendant's natural life. (Pen. Code, §§ 667, subd. (e)(2)(A)(i)-(iii), 1170.12, subd. (c)(2)(A)(i)-(iii).) Even if, as in this case, only one qualifying prior felony conviction is alleged, sustaining the prior conviction allegation will require the sentence be doubled in length, essentially adding as much time in prison as defendant received for committing the substantive offense.

(Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The lead opinion's comparison of the mental anguish suffered by capital versus noncapital defendants is thus unconvincing.

Finally, the majority finds capital penalty trials are different in kind because the evidence presented in such hearings "usually overlaps or supplements the evidence offered at the guilt phase of the trial," whereas "in a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) Even if true, this proposed distinction finds no support in *Bullington* whatsoever. I note the majority fails to cite *Bullington* or, indeed, any authority, indicating this evidentiary factor has any relevance to a double jeopardy analysis.

Nor am I convinced the majority is correct as an empirical matter. Although "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding" is an aggravating circumstance in this state's death penalty scheme (see Pen. Code, § 190.3, factor (a)), and a defendant is entitled to argue lingering doubt as a mitigating circumstance (*People v. Sanchez* (1995) 12 Cal.4th 1, 77), penalty phase evidence is often untethered to the facts of the crime. Instead, such evidence frequently recounts the defendant's past violent criminal conduct and/or explains aspects of the defendant's upbringing or mental health history, evidence, in other words, that does not overlap with the evidence presented at the guilt phase of the trial.

Moreover, even in a bifurcated hearing on prior felony conviction allegations, the evidence must sometimes establish some aspect of the present crime over and above the minimum necessary to obtain a guilty verdict on the substantive offense. For example, to impose a five-year enhancement term for a prior felony conviction pursuant to Penal Code section 667, subdivision (a), the

People must not only prove the existence of a qualifying prior conviction, but must also prove *the present conviction* qualifies as a "serious felony" under section 1192.7, subdivision (c). (See *People v. Equarte* (1986) 42 Cal.3d 456 [for assault with a deadly weapon to qualify as "serious felony" eligible for enhancement, state must prove personal weapon use or personal infliction of bodily injury]; *People v. Thomas* (1986) 41 Cal.3d 837 [observing that for burglary to qualify as a "serious felony" eligible for enhancement, state must prove defendant personally used a gun or deadly weapon, or inflicted great bodily injury, or entered a residence].) In such a case, we cannot say "the factual determinations [at the separate hearing] are generally divorced from the facts of the present offense . . . ." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.)

In sum, the majority proffers no persuasive reason to support its assertion that *Bullington's* "hallmarks of the trial on guilt or innocence" test is limited to capital cases.

#### 4. The Lead Opinion's Other Arguments are Unpersuasive

The lead opinion announces other reasons for declining to apply the federal double jeopardy clause in this case, but none is persuasive. For example, the lead opinion asserts that "a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." (Lead opn., *ante*, p. 5.) Because California thus could choose to provide *very few* procedural protections for sentencing allegations, reasons the lead opinion, it could certainly choose to provide less than full protection. From this, the lead opinion concludes "a trial of sentencing allegations *arguably* need not provide double jeopardy protection." (*Id.*, at p. 6, italics added.)

This argument is beside the point. While it may be true our Legislature could choose to provide fewer procedural protections for sentence enhancements

(see *People v. Vera* (1997) 15 Cal.4th 269, 286 (dis. opn. of Werdegarr, J.)), it has not done so. If anything, legislative action has moved in the opposite direction, ensuring a high degree of procedural protection for defendants charged with sentence-enhancing allegations. (See, e.g., Pen. Code, §§ 667, subd. (c) [prior convictions under legislative Three Strikes law must be "pled and proved"], 1170.12, subd. (a) [same under initiative Three Strikes law], 667.5, subd. (d) [prior prison term enhancements "shall not be imposed unless they are charged and admitted or found true"], 1025 [right to jury for prior felony conviction enhancements], 1102 [rules of evidence apply to criminal "actions"]; see also Pen. Code, § 190.3 [in penalty phase of capital case, evidence of prior criminal activity shall not be admitted "for an offense for which the defendant was prosecuted and acquitted"].)

The lead opinion also suggests federal double jeopardy cannot apply here because the Fifth Amendment specifically refers to "the offense," and "[t]he [double jeopardy] clause makes no express reference to sentencing determinations." (Lead opn., *ante*, p. 7.) This argument is belied by *Bullington* itself, for the high court applied the federal double jeopardy clause to the Missouri capital sentencing trial although no "offense" was involved therein. Clearly any suggestion the federal double jeopardy clause is limited to criminal "offenses" is incorrect.

#### 5. Authority from the Federal Circuits and Other States

Citing several cases from the various federal circuits and other states, the majority admits these courts "are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) As the lead opinion concedes, several federal circuits and state courts have profitably applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find the federal double jeopardy clause



applicable to noncapital sentencing proceedings. For example, in *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368 (hereafter *Briggs*), Texas indicted the defendant for burglary and alleged two prior felony convictions which, if proved, required he be sentenced to life in prison. After a jury found the defendant guilty of the charged burglary, the state dismissed the charged prior convictions, citing proof problems. The defendant sought a new trial and the state joined the motion. When it was granted, the state again indicted the defendant for burglary. This time, however, the state charged two different prior felony convictions to enhance the sentence. (*Id.*, at p. 369.) The prior felonies were found true and the defendant was sentenced to life imprisonment.

The Fifth Circuit Court of Appeals applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to reverse the district court's denial of relief on habeas corpus. "Like the death-sentencing procedure discussion in *Bullington v. Missouri*, 451 U.S. 430 (1981), the Texas scheme requires the state to prove at trial, beyond a reasonable doubt, the predicate facts, two prior convictions, necessary for the imposition of the harsher sentence. 'The two prior convictions must be alleged in the indictment, and upon review the allegations are treated the same as allegations of the elements of a substantive offense.' [Citation.] Therefore, if the state fails to introduce sufficient evidence of the defendant's status as an habitual offender at a first trial, the Double Jeopardy Clause prohibits the sentencing of the defendant as an habitual offender at a second trial." (*Briggs*, *supra*, 764 F.2d at p. 371.)

The Supreme Court of Washington reached the same conclusion in *Hennings*, *supra*, 670 P.2d 256. The defendant in *Hennings* was charged with robbery and with being an habitual criminal under Washington's habitual offender law. He ultimately pleaded guilty to robbery, but the trial court dismissed the habitual criminal charge, concluding the People failed to prove defendant's guilty

plea in the prior conviction matter was knowingly and voluntarily obtained, a statutory requirement under Washington law. (*Id.*, p. 257.)

The Washington high court held double jeopardy precluded the People from recharging and retrying the habitual criminal allegation. The court explained that, like the capital proceeding at issue in *Bullington*, *supra*, 451 U.S. 430, an habitual offender determination under Washington law takes place in a separate proceeding in which the state bears the burden of proof beyond a reasonable doubt. In addition, should the allegation be proved, the range of penalties is strictly circumscribed: if the sentence is not suspended, the habitual offender must be sentenced to life imprisonment; there is no other sentence. (*Hennings*, *supra*, 670 P.2d at p. 258.) The "similarities [between *Bullington* and the Washington habitual offender law] indicate that under *Bullington* double jeopardy principles should apply to Washington's habitual criminal proceedings." (*Hennings*, *supra*, 670 P.2d at p. 260.)

As illustrated by *Briggs*, *supra*, 764 F.2d 368, and *Hennings*, *supra*, 670 P.2d 256, the majority rule that has emerged from the federal circuit courts and state high courts is this: *Bullington*'s "hallmarks of the trial on guilt or innocence" test is the applicable standard to determine whether noncapital sentencing proceedings are subject to the federal double jeopardy clause. As in *Briggs* and *Hennings*, many courts have found double jeopardy applies to bar retrial of a noncapital sentencing allegation because the state law at issue bore the hallmarks of a trial on guilt. (In addition to *Briggs*, *supra*, 764 F.2d 368 [5th Circuit], and *Hennings*, *supra*, 670 P.2d 256 [Washington], see, e.g., *Bohlen v. Caspari*, *supra*, 979 F.2d at p. 113, *revd.* on other grounds in *Caspari*, *supra*, 510 U.S. 383 [8th Circuit, interpreting Missouri habitual offender law]; *Nelson v. Lockhart* (8th Cir. 1987) 828 F.2d 446, 447-448, *revd.* on other grounds, *Lockhart v. Nelson*, *supra*, 488 U.S. 33 [interpreting Arkansas habitual offender law]; *Durosko v. Lewis*,

*supra*, 882 F.2d at p. 359 [9th Circuit interpreting Arizona law]; *People v. Quintana*, *supra*, 634 P.2d at p. 419 [Colorado]; *Cooper*, *supra*, 631 S.W.2d at pp. 513-514 [Texas]; *Ex Parte Augusta* (Tex.Crim.App. 1982) 639 S.W.2d 481, 484 [following *Cooper*]; cf. *DeBussi v. State* (Miss. 1984) 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

Other courts have applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings to come to a contrary conclusion, i.e., that the sentencing law at issue did not bear sufficient similarity to a trial on the question of guilt. Accordingly, these courts have found double jeopardy did not prohibit a retrial under the particular statutory scheme at issue. For example, in *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451 (hereafter *Wilmer*), a challenge to a Pennsylvania drug trafficker sentence enhancement scheme, the appellate court applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find double jeopardy did not apply. Noting the state was permitted to appeal the sentence in the particular statutory sentencing scheme at issue, the *Wilmer* court concluded there would be no second "trial." More importantly, only a preponderance of the evidence test was applicable. "The lower standard of proof signifies a more lax procedure which in turn signifies that a hearing is not, in the *Bullington* calculus, trial-like." (*Wilmer*, *supra*, 30 F.3d at pp. 457-458.) Contrary to the suggestion of the majority that *Wilmer* held double jeopardy could not apply to noncapital sentencing because of the absence of the death penalty, the *Wilmer* court applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test and concluded the state sentencing scheme at issue there was insufficiently analogous to a trial on guilt.

*People v. Levin* (Ill. 1993) 623 N.E.2d 317, which dealt with the Illinois habitual offender statute, also applied the *Bullington* analysis to a noncapital case

before finding double jeopardy did not apply. "The legislature has fashioned the habitual-criminal sentencing proceeding to be less formalized than a trial. Indeed, the paucity of due process protections at sentencing supports the conclusion that the legislature has deemed the defendant's interests at this stage of the proceeding to warrant fewer of those protections than at trial. We conclude that the separate hearing procedure under our Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt." (623 N.E.2d at p. 325.) In other words, the separate hearing held pursuant to Illinois's habitual offender statute does not bear the hallmarks of a trial on guilt, so double jeopardy does not apply.

Other cases applying the *Bullington* "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings and finding such hallmarks absent include *Woodall v. United States* (8th Cir. 1995) 72 F.3d 77, 79-80 (interpreting federal Armed Career Criminal Act), *State v. Sowards* (Ariz. 1985) 709 P.2d 513, 515 (Arizona), *State v. Cobb* (Mo. 1994) 875 S.W.2d 533, 535, hereafter *Cobb* (Missouri),<sup>3</sup> *Fitzpatrick v. State* (Mont. 1981) 638 P.2d 1002, 1017

<sup>3</sup> Although the lead opinion cites this case in support, and admittedly some language in the *Cobb* opinion suggests the court found Missouri's noncapital persistent offender law distinguishable from the sentencing scheme in *Bullington* on the ground the Missouri law did not involve the death penalty, the Missouri Supreme Court also had this to say: "In the sentencing of a persistent offender, the trial court's discretion is essentially unfettered. The judge has a wide range of punishment from which to choose and is not inhibited by explicit standards imposed by statute. In addition, as in *DiFrancesco*, the choice presented the trial judge in sentencing persistent offenders is far broader than that faced by a jury in sentencing a defendant to death. For the same reasons that *Bullington* is distinguishable from *DiFrancesco*, *Pearce*, *Chaffin* and *Stroud*, *Bullington* is distinguishable from this case. Therefore, applying the rationale of *Bullington*, double jeopardy does not attach to Missouri's noncapital persistent offender sentencing." (*Cobb*, *supra*, 875 S.W.2d at p. 535.) It thus appears the *Cobb* court

(footnote continued on next page)



(Montana), and *People v. Sailor* (1985) 491 N.Y.S.2d 112 (New York). (See also, *State v. Avila* (Ariz. 1985) 710 P.2d 440, 445-446 [quoting *Sowards* with approval]; cf. *State v. Ledbetter* (Conn. 1997) 692 A.2d 713, 717-718 [suggesting *Bullington* applies to state's noncapital persistent offender law, but concluding defendant waived the claim].) All of these cases recognize the applicable test in determining whether double jeopardy applies to bar retrial is whether the noncapital sentencing scheme bears sufficient similarity to a trial on guilt so that one can conclude, as in *Bullington*, that a not true finding operates as an "acquittal" of the sentencing allegation. (See, e.g., *Woodall v. United States*, *supra*, 72 F.3d at p. 79 [emphasizing government's burden of proof is only by a preponderance of evidence to conclude double jeopardy does not apply].)

The majority's attempt (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3) to distinguish these cases wholesale as insufficiently impressed with the "unique nature and constitutional origins" of the death penalty is flawed, relying as it does on an unjustified embellishment of the Supreme Court's rationale in *Bullington*. Although *Bullington* involved a capital sentencing scheme, the mere possibility of the death penalty was not cited by the *Bullington* court as central to its rationale. As noted above, the Supreme Court of Washington has explicitly rejected the notion that *Bullington* was premised on the fact the death penalty was there involved. (See *Hennings*, *supra*, 670 P.2d at p. 260; see also *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376-377 (conc. opn. of Anderson, J.) [fact death penalty was involved in *Bullington* was "not relied on nor even articulated

---

(footnote continued from previous page)

applied the *Bullington* analysis to conclude Missouri's persistent offender law did not bear the hallmarks of a trial on guilt or innocence.

by the Supreme Court as a basis for its holding"].) To the extent the majority relies on this "death-penalty-only" view of *Bullington*, it relies on an augmentation of that decision's rationale that appears nowhere in the body of the opinion itself.

The majority relies on cases which, admittedly, find *Bullington* does not apply to noncapital sentencing proceedings. In addition to espousing the minority rule, however, many of these cases employ faulty reasoning or announce their interpretation of *Bullington* in dicta. For example, in *State v. Aragon* (N.M. 1993) 861 P.2d 948, cited by the lead opinion in support (lead opn., *ante*, p. 15), the New Mexico Supreme Court found that double jeopardy did not attach to New Mexico's habitual offender proceedings because the law does not create a substantive criminal offense. (See *id.*, pp. 950-951 ["we have determined that habitual offender proceedings do not involve a determination of guilt of *any offense*" (italics added)], 953 ["double jeopardy does not attach to the habitual offender proceeding . . . because . . . there was no prosecution of *an offense*" (italics added)].) This reasoning misreads *Bullington*, for, as explained, *ante*, the jury in the Missouri capital sentencing trial in *Bullington* also did not try a separate "offense." Instead, the *Bullington* jury was deciding between life or death as an appropriate sentence. Clearly, whether or not a sentencing scheme delineates an "offense" is not the test. Accordingly, *Aragon's* reasoning is flawed.

*Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144 (hereafter *Denton*), also cited by the majority in support (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3), contains the same analytical flaw (873 F.2d at p. 147 [Indiana's habitual offender statute "*does not create a separate offense . . .*"], italics added), but is unpersuasive for a more basic reason. In *Denton*, the defendant was convicted of rape and was also found to be an habitual offender under Indiana law based on his conviction of four prior unrelated felonies. After his rape conviction, one of the four prior felony convictions was vacated by a different court. The state

moved to retry the habitual offender allegation with the remaining three prior felony allegations (only two were necessary), deleting the now-vacated conviction. In these circumstances, the court held retrial was permissible.

*Denton* thus does not present a situation in which the state, with all its resources, failed to present sufficient evidence to convict. Instead, the matter was one of trial error for which the federal double jeopardy clause is inapplicable. (*Burks, supra*, 437 U.S. at pp. 15-16.) As even the *Denton* court opined: "This clearly is a case of 'trial error,' and not of insufficiency of the evidence." (*Denton, supra*, 873 F.2d at p. 148.) Any discussion in *Denton* of the application of *Bullington* was thus dictum.

*Linam v. Griffin, supra*, 685 F.2d 369, also declares its interpretation of *Bullington* in dictum. In *Linam*, the Tenth Circuit Court of Appeals found a state appellate court's reversal of a noncapital sentence enhancement "meets the *Burks* Court's definition of trial error and is not a true finding of inadequacy of evidence." (*Id.*, at p. 373.) Because only trial error was present in *Linam*, no double jeopardy bar to retrial applied irrespective of that court's views on *Bullington*. (See generally, *Bohlen v. Caspari, supra*, 979 F.2d at p. 114 [concluding *Linam* and *Denton* are distinguishable as cases involving trial error and not insufficiency of evidence]; *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1276 (dis. opn. of Moore, J.) [finding *Denton*'s and *Linam*'s discussion of *Bullington* to be dictum].) The majority's reliance on dicta in *Denton, supra*, 873 F.2d 144, and *Linam, supra*, 685 F.2d 369, is thus misplaced.

The majority rule emerging from the federal circuit courts and the high courts from our sister states is this: the test to determine whether the federal double jeopardy clause applies to bar multiple retrials of noncapital sentencing determinations is *Bullington*'s "hallmarks of the trial on guilt or innocence" test. The cases cited by the majority in support of its contrary position delineate a

minority rule, and are for the most part weakly reasoned or announce their interpretation of *Bullington* in dictum. Because I find the majority rule better reasoned and thus more persuasive, I would apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to the facts of this case.

### C. Applying *Bullington* to This Case

*Bullington* found the federal double jeopardy clause applied to Missouri's capital sentencing hearing because that hearing bore the "hallmarks of the trial on guilt or innocence." The high court found it significant that the defendant enjoyed the right to a separate hearing and to a jury and that the jury was not granted broad discretion to choose an appropriate punishment, but was instead required to choose between two alternates authorized by statute. Perhaps most importantly, the prosecution bore the burden of establishing necessary facts beyond a reasonable doubt. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Bullington, supra*, 451 U.S. at p. 438.)

These same "hallmarks of the trial on guilt or innocence" apply to a trial on a sentence enhancement allegation. In such a hearing, the People bear the burden of proving the sentence enhancement beyond a reasonable doubt (*People v. Tenner, supra*, 6 Cal.4th at p. 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable doubt to "criminal actions"]), and the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancement must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c); 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court. (Pen. Code, § 1025; see also Pen. Code, § 969½ [requiring defendant be arraigned on a prior conviction allegation added to complaint after defendant has pleaded guilty].) The jury is limited to two alternatives (finding the allegation true or untrue) and is not



authorized to choose among a wider array of sentencing choices. The trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon, supra*, 9 Cal.4th 69), but in any event, the defendant is entitled to a contested "trial" on the enhancement allegations, including the right to present evidence.

This "trial" on sentence enhancement allegations may be profitably contrasted with a "traditional" sentencing hearing, in which the People bear no burden of proof, the trial court can receive evidence from outside of court (such as a probation report), the trial court wields broad discretion to fashion a sentence appropriate to the defendant's crime, and, of course, a defendant has no right to a jury. As in *Bullington*, the "trial" on the sentence enhancement allegation is for all intents and purposes identical to the preceding trial on the question of the defendant's guilt or innocence of the substantive criminal charges. Under these circumstances, *Bullington* compels the conclusion the federal double jeopardy clause applies to this case to bar retrial of defendant's prior felony conviction sentence enhancement.

## II. DOUBLE JEOPARDY UNDER THE CALIFORNIA CONSTITUTION

### A. Relying on the California Constitution

Irrespective of whether the majority is correct regarding the nonapplicability of the federal double jeopardy clause to this case, I conclude retrial of the prior felony conviction allegation is prohibited by the state constitutional double jeopardy clause. (Cal. Const., art. I, § 15.) Our state counterpart to the federal double jeopardy clause first appeared in the California Constitution of 1849, article I, section 8, where the language tracked the federal guarantee. The provision was moved essentially unchanged to article I, section 13 in the California Constitution of 1879, and finally came to rest in article I, section

15, of the present California Constitution; it provides: "Persons may not twice be put in jeopardy for the same offense . . . ."

Article I, section 24 of the state charter, added by popular vote in 1974, is also relevant to our discussion; it provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." That section was amended by Proposition 115 to state the following qualification: "In criminal cases the rights of a defendant to . . . not be placed twice in jeopardy for the same offense . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This [state] Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . ." This latter provision was invalidated, however, in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (hereafter *Raven*), as an improper revision of the state Constitution.

In light of the holding in *Raven* we remain free to continue our long-standing and constitutionally authorized practice, in appropriate situations, of interpreting our state Constitution to grant greater protection to state residents than would be afforded by the high court under the federal Constitution. It is true, as the lead opinion notes, that we have previously explained there must be "cogent reasons . . . before a state court construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (*Raven, supra*, 52 Cal.3d at p. 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.) This admonishment finds no application here, however, for, as explained, *ante*, the Supreme Court has never ruled on the question whether the federal double jeopardy clause applies to noncapital sentence enhancements. There is thus no federal construction from which to depart.

Significantly, we most recently faced this federal versus state Constitution question in a case specifically posing a double jeopardy question; there, we reaffirmed that "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than the federal Constitution." (*People v. Fields* (1996) 13 Cal.4th 289, 298.)

Indeed, good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies here. It is hornbook law that at the time the Bill of Rights was ratified in 1791, and until the 1920's, the Bill of Rights was not understood to apply against the states at all. (*Barron v. Baltimore* (1833) 32 U.S. (7 Pet.) 243.) Due to the selective nature of the incorporation doctrine, which arose in this century (see generally, Nowak & Rotunda, Constitutional Law (5th ed. 1995) § 10.2, pp. 339-342), application to the states of the various portions of the Bill of Rights was addressed judicially in a sequential manner. The federal constitutional guarantee not to be placed twice in jeopardy was not held applicable to state prosecutions until 1969: (*Benton v. Maryland*, *supra*, 395 U.S. 784.) Until that year, we had always relied solely on our own state Constitution to protect our residents from being placed twice in jeopardy.

Moreover, other than the rather obscure provisions in article II, section 10 of the federal Constitution (prohibitions of ex post facto laws, bills of attainder, interference with contracts), the Constitution placed no limitation on states in the area of personal liberties until ratification of the Fourteenth Amendment in 1868, almost two decades after California was granted statehood. From this bit of history, we can draw two conclusions. First, "[f]or most of the life of this nation the Federal Constitution offered no protection for the personal, religious, intellectual and political rights of its citizens in their relations with state and local government. In California those protections were provided by the Declaration of

Rights — Article I of the California constitution — which contains provisions much like those of the Federal Bill of Rights." (Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground* (1973) 61 Cal.L.Rev. 273, 274, capitalization in original [hereafter Falk article].) Second, and more important for our purposes, for the majority of this state's political life, *it has been the state, not federal, Constitution that protected the personal liberties — specifically the right to not be placed twice in jeopardy — of Californians.*

If we go back even further in history, we find that state constitutional protections of individual liberties are not even derived from the Bill of Rights; rather, the reverse is true. "The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions." (Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv.L.Rev. 489, 501 [hereafter Brennan article].) When drafting the Declaration of Rights in our state Constitution, first in 1849 and again in 1879, "the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models." (*Raven*, *supra*, 52 Cal.3d at p. 353.) There is thus good reason to look first to our state Constitution for guidance.

In interpreting the extent of various rights of personal liberty, this court has in the past eschewed the federal document and relied on the state Constitution in two distinct situations. First, we sometimes relied on our state Constitution to diverge from the high court's interpretation of an analogous federal constitutional provision when we concluded the high court did not provide sufficient protection for individual liberties. For example, we held in *People v. Brisendine* (1975) 13



Cal.3d 528, 545-552, that a search incident to lawful arrest must be justified by a rule of reasonableness, contrary to the Supreme Court's decision in *United States v. Robinson* (1973) 414 U.S. 260, which held a search incident to lawful arrest was per se reasonable.<sup>4</sup> (See cases collected at *Raven*, *supra*, 52 Cal.3d at p. 354; see generally, Grödin, Massey & Cunningham, *The California State Constitution* (1993) pp. 21-26 & accompanying notes; Falk article, 61 Cal.L.Rev. at pp. 277-280 & accompanying notes.)

Although we invalidated in *Raven* that portion of Proposition 115 tying state constitutional interpretation to the federal Constitution, we nonetheless remain cognizant the electorate expressed displeasure with state constitutional interpretations that granted criminal defendants greater procedural rights than are required under the federal Constitution. Accordingly, although we remain free, in light of *Raven*, to continue to interpret the state Constitution more expansively than its federal counterpart, we have declared there must be "cogent reasons" to do so. (*Raven*, *supra*, 52 Cal.3d at p. 353.) Here, however, we are not presented with such a situation because, as explained *ante*, the United States Supreme Court has never ruled on the precise issue before us.

We are, rather, presented with the second type of situation in which we historically have interpreted the state Constitution to provide protection of individual liberties, namely, when no United States Supreme Court authority had yet emerged. For example, in an opinion by Justice Mosk, we held the California Constitution guaranteed the right to counsel for persons charged with

<sup>4</sup> Of course, *Brisendine* and other state-law-based search-and-seizure cases were superseded by the enactment of Proposition 8. (See Cal. Const, art. I, § 28(d) [right to truth-in-evidence provision]; *In re Lance W.* (1985) 37 Cal.3d 873 [upholding same].)

misdemeanors. (*In re Johnson* (1965) 62 Cal.2d 325, 329.) At the time, no federal constitutional rule had yet emerged. Seven years later, the Supreme Court found a federal constitutional right to counsel in misdemeanor cases, at least where imprisonment was a possibility. (*Argersinger v. Hamlin* (1972) 407 U.S. 25.)

In the absence of federal constitutional authority binding us, we clearly are free to look to our state Constitution. Indeed, reliance on the state Constitution is preferable here, for not only has the United States Supreme Court never specifically ruled on the applicability of the federal double jeopardy clause to noncapital sentencing proceedings or sentence enhancements, it has had several opportunities to address the issue and has declined each time. (*Caspari*, *supra*, 510 U.S. 383, *Lockhart v. Nelson*, *supra*, 488 U.S. 33; *Hunt v. New York*, *supra*, 502 U.S. 964 (opn. of White, J., dis. from den. of cert.); see also *Carpenter v. Chaplana*, *supra*, 72 F.2d 1269, cert. den. \_\_\_ U.S. \_\_\_, 136 L.Ed.2d 61 (1996); *Wilmer*, *supra*, 30 F.3d 451, cert. den. 513 U.S. 970 (1994); *Denton*, *supra*, 873 F.2d 144, cert. den. 493 U.S. 941 (1989); *Duroske v. Lewis*, *supra*, 882 F.2d 357, cert. den. 495 U.S. 907 (1990); *Linam v. Griffin*, *supra*, 685 U.S. 369, cert. den. 459 U.S. 1211 (1983); *People v. Levin*, *supra*, 623 N.E.2d 317, cert. den. sub nom. *Levin v. Illinois*, 513 U.S. 826 (1994); *People v. Sailor*, *supra*, 491 N.Y.S.2d 112, cert. den. sub nom. *Sailor v. New York*, 474 U.S. 982 (1985).) Not only, therefore, are we left with no definitive holding from the high court, we cannot anticipate that court will soon resolve the question. This uncertain state of affairs provides "cogent reasons" (*Raven*, *supra*, 52 Cal.3d at p. 353), were they needed, for us to rely on our state Constitution. (See *Ex Parte Augusta*, *supra*, 639 S.W.2d at p. 485 [applying double jeopardy under Texas Constitution to noncapital sentencing proceeding]; *DeBussi v. State*, *supra*, 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

### B. Double Jeopardy under the State Constitution

When double jeopardy principles are involved, history shows we have not felt compelled to walk in the footprints left by United States Supreme Court precedent. For example, in *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, we held double jeopardy would preclude retrial following a mistrial granted over the defendant's objection. Although a retrial would have been allowed under the federal Constitution (*Gori v. United States* (1961) 367 U.S. 364), we simply stated: "[the federal] holding [in *Gori*] does not accord with the uniform construction placed by the court upon the jeopardy provision of the California Constitution. . . ." (*Cardenas, supra*, at p. 276.) We explicitly reaffirmed *Cardenas* in *Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-716.

*People v. Henderson* (1963) 60 Cal.2d 482 (hereafter *Henderson*), is similar. In *Henderson*, the defendant was convicted, on his plea of guilty, of first degree murder and sentenced to life imprisonment. On appeal, the court reversed for trial court error in permitting the defendant to withdraw his original plea of not guilty. On remand, the defendant was again convicted; this time, he was sentenced to suffer the death penalty. On appeal in this court, the defendant argued imposition of the death penalty on retrial violated his right against double jeopardy as set forth in article I, then-section 13 of the state Constitution.

This court agreed. Noting that in *Stroud, supra*, 251 U.S. 15, the Supreme Court held the federal double jeopardy clause did not prohibit imposition of the death penalty after a retrial for a defendant originally sentenced to life imprisonment, this court found the state Constitution marked out a different path: "A defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing

appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Henderson, supra*, 60 Cal.2d at p. 497.)

The Supreme Court followed *Stroud* with *North Carolina v. Pearce, supra*, 395 U.S. 711, a 1969 noncapital case, holding a greater sentence after a retrial does not violate the federal due process clause. We again followed our own path, applying to noncapital cases the state constitutional double jeopardy rule set forth in *Henderson, supra*, 60 Cal.2d 482. (*People v. Hood* (1969) 1 Cal.3d 444, 459 [following *Henderson* but not mentioning *Pearce*].) As one Court of Appeal observed: "[a]lthough presented with . . . the opportunity to [overrule *Henderson*] . . . , the court has never retreated from the rationale or holding of *Henderson*." (*People v. Superior Court (Harris)* (1990) 217 Cal.App.3d 1332, 1337, citing inter alia, *People v. Collins* (1978) 21 Cal.3d 208, 216-217; *People v. White* (1976) 16 Cal.3d 791, 802; *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *Curry v. Superior Court, supra*, 2 Cal.3d at pp. 716-717; *People v. Hood, supra*, 1 Cal.3d at p. 459.)

In *People v. Comingore* (1977) 20 Cal.3d 142, the defendant, who had stolen a car in California and driven it to Oregon, was convicted in Oregon of unauthorized use of a vehicle. Upon his release, he was prosecuted in California for grand theft auto based on essentially the same acts that gave rise to the Oregon conviction. Although the California prosecution would have been permissible under the high court's interpretation of the Fifth Amendment double jeopardy clause (see *Abbate v. United States* (1959) 359 U.S. 187), we held Penal Code section 793, a statute implementing double jeopardy principles, prohibited the California trial as it was predicated on the same facts that formed the basis of the Oregon trial. We did not expressly mention the state Constitution, but merely stated the rule in *Abbate* "does not preclude a state from providing greater double



jeopardy protection than is provided by the federal Constitution . . . ."

(*Comingore, supra*, 20 Cal.3d at p. 145.) Although *Comingore* is not unequivocally a state constitutional (as opposed to state statutory) case, the principles at work seem congruent, especially because Penal Code section 793 merely implements the state constitutional double jeopardy guarantee.

In light of this court's strong history of relying on the state Constitution as a document of independent force in the double jeopardy area, I would rely on that document to resolve this case.

### C. Applicability of State Double Jeopardy Principles to Sentence Enhancement Allegations

As the lead opinion concedes, we recently determined double jeopardy principles precluded retrial of a firearm use enhancement allegation, charged pursuant to Penal Code section 12022.5, where the defendant's jury had previously found the allegation not true. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, fn. 22 [hereafter *Marks*]; cf. *People v. Santamaria* (1994) 8 Cal.4th 903, 910 ["The parties agree(d) that the jury's 'not true' finding on the knife-use enhancement allegation precludes retrial of that allegation"].) Noting the jury had found the allegation the defendant personally used a firearm "not true," we held "[t]he jury's rejection constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks, supra*, 1 Cal.4th at p. 78, fn. 22.)

Because *Marks* is but a few years old and applied double jeopardy principles to a finding on a sentence enhancement, one might assume it provides relevant authority to decide this case. The lead opinion, however, posits two reasons why it believes *Marks* is irrelevant to the proper resolution of this case. First, the lead opinion opines that *Marks* relies on a line of cases that are based on a state constitutional rule of double jeopardy that precludes penalizing a defendant with a longer sentence following a successful appeal of his or her conviction.

(Lead opn., *ante*, pp. 18-19.)<sup>5</sup> Second, the lead opinion asserts that "because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate." (Lead opn., *ante*, p. 19.)

The lead opinion's attempt to cabin the rationale in *Marks* founders because it fails to account for the *Marks* decision's emphasis on the fact the jury in that case found the enhancement allegation "not true," and *Marks*'s characterization of this finding as an "acquittal." The concept of an acquittal clearly implicates the historic constitutional double jeopardy bar to retrial. Indeed, if the federal double jeopardy clause protects against anything, it "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce, supra*, 395 U.S. 711, 717, italics added, fn. omitted.) "[I]t has long been settled under the Fifth Amendment that a verdict of *acquittal* is final, ending a defendant's jeopardy . . . ." (*Green v. United States, supra*, 355 U.S. at p. 188, italics added.) By emphasizing the jury found the enhancement allegation "not true" and characterizing the finding as an "acquittal," the *Marks* court was clearly invoking this "long-settled" constitutional doctrine.

Moreover, the *Henderson-Collins-Hood* line of cases (see fn. 5, *ante*) cited in *Marks*, does not prohibit any retrial at all, but merely limits the aggregate sentence to no more than was achieved in the first trial. Thus, in *Henderson, supra*, 60 Cal.2d 482, where the defendant was sentenced to life imprisonment following his first trial, we did not purport to prevent any retrial whatsoever; we merely held he could not be given the greater sentence of the death penalty

<sup>5</sup> Such cases include *People v. Collins, supra*, 21 Cal.3d 208, 216-217, *People v. Hood, supra*, 1 Cal.3d 444, 459, *Henderson, supra*, 60 Cal.2d 482, 496-497, *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, and *People v. Asbury* (1985) 173 Cal.App.3d 362, 366.

following retrial. Invoking the same rule in *People v. Hood*, *supra*, 1 Cal.3d 444, we permitted a retrial but limited the aggregate sentence to that achieved in the first trial. (*Id.*, p. 459.) If, as suggested by the lead opinion, *Marks* was based solely on the state constitutional right against imposition of a greater sentence on retrial following a successful appeal, the *Marks* opinion should have permitted a retrial. Instead, *Marks* concluded “[t]he jury’s rejection [of the enhancement] constituted an express acquittal on the enhancement and forecloses any retrial.” (*Marks*, *supra*, 1 Cal.4th at p. 78, fn. 22, italics added.) The lead opinion’s belated attempt to redefine the meaning of *Marks* is thus unpersuasive.

Moreover, the lead opinion’s restrictive reading of the double jeopardy clause of the California Constitution fails to address the following authorities, which pose analogous sentence enhancements and conclude double jeopardy applies: *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1309 (double jeopardy precludes retrial of Pen. Code, § 667.7 habitual offender enhancement because it was reversed for insufficient evidence); *People v. Pettaway*, *supra*, 206 Cal.App.3d at p. 1332, reversed on other grounds *sub nom.*, *Pettaway v. Plummer* (9th Cir. 1991) 943 F.2d 1041 (state constitutional double jeopardy provision prohibits retrial of Pen. Code, § 12022.5 [personal firearm use] and Pen. Code, § 12022.7 [personal infliction of great bodily injury] enhancements following jury verdict enhancements were “not true” as to murder charge); *People v. Jones* (1988) 203 Cal.App.3d 456, 460, disapproved on another point, *People v. Tenner*, *supra*, 6 Cal.4th at p. 566, fn. 2 (double jeopardy precludes retrial of Pen. Code, § 667.5 prior felony conviction enhancement); *People v. Raby* (1986) 179 Cal.App.3d 577, 591 (double jeopardy precludes retrial of prior felony enhancement); and *People v. Bonner* (1979) 97 Cal.App.3d 573, 575 (double jeopardy prohibits reprosecution of narcotics weight enhancement allegation following appellate reversal for insufficient evidence); see also *People v. Guillen*

(1994) 25 Cal.App.4th 756 (reaffirming *Bonner*, but finding mistrial on weight enhancement does not preclude retrial); *People v. Reynolds* (1989) 211 Cal.App.3d 382, 390 (double jeopardy does not prevent retrial of serious felony enhancement under Pen. Code, § 667 because it was reversed for trial error and not for insufficient evidence).

It bears repeating that “the double jeopardy clause is no mere ‘technicality’; it is an integral part of ‘the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial.’” (*United States v. Jorn* [(1971)], *supra*, 400 U.S. [470] at p. 479 (plur. opn.)) Effectuating the spirit as well as the letter of its liberality, courts have ‘disparaged “rigid, mechanical” rules in [its] interpretation . . . [Citation.]’ (*Serfass v. United States* [(1975)], *supra*, 420 U.S. [377] at p. 390.) In animating our own independent ‘vital safeguard,’ we have expressly refused to perpetuate ‘spurious distinction[s]’ at the risk of ‘giving our constitutional prohibition against twice in jeopardy a “narrow, grudging application” unsupported by either logic or reason.’ (*Gomez v. Superior Court* [(1958)], *supra*, 50 Cal.2d [640] at p. 649 . . . .)” (*Marks*, *supra*, 1 Cal.4th at p. 79.)

Perhaps a bit uncomfortable with its decision — understandably, since the specter of a defendant being retried innumerable times on the same allegations until the People finally succeed in proving them true is indeed disturbing — the lead opinion concludes by detailing a long list of what it is not deciding. It explains that although the People are not prohibited by double jeopardy principles from retrying the prior felony conviction enhancement, other limits might curtail the ability of the People on retrial to obtain a true finding. The lead opinion opines, for example, that on retrial the People cannot rely solely on the same evidence as initially presented, for even if the bedrock principle of double jeopardy does not apply to bar retrial, the more amorphous prudential principles of law of



the case will apply. The lead opinion, although it declines to elaborate, also suggests unspecified limitations might restrict such required additional evidence. Similarly, the lead opinion hints there may be due process limits in such a retrial. (Lead opn., *ante*, p. 21.) One can only guess what these intimations mean for future cases; what is clear is that for this defendant, on the facts of this particular case, retrial following acquittal is permitted.

Such legal contortions are unnecessary. Not only does this court have a long history of relying on the state constitutional double jeopardy clause rather than its federal counterpart, there is in this state an unbroken line of cases applying the double jeopardy principles to noncapital sentence enhancement allegations. The majority breaks from this history without persuasive reasons for doing so. Accordingly, I would find the Court of Appeal's decision that the People adduced insufficient evidence to prove the enhancement alleged pursuant to Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d), prohibits retrial of the same enhancement allegation pursuant to article I, section 15 of the California Constitution. The People having had one good chance to prove the truth of the prior conviction allegation, they should now be barred by the state constitutional double jeopardy clause from a second chance to prove the same charge.

#### CONCLUSION

The lead opinion twice mentions the ease with which the People can prove a prior felony conviction such that it may be used to increase an offender's sentence: "a prior conviction trial," we are told, "is simple and straightforward," and "the outcome is relatively predictable." (Lead opn., *ante*, p. 13.) And again, repeating itself, the lead opinion declaims: "trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable." (*Id.*, at p. 21.) I

agree. Under such circumstances, I see no reason to do violence to double jeopardy principles merely to permit the People multiple opportunities to prove the existence of such prior convictions. I dissent.

WERDEGAR, J.

WE CONCUR:

MOSK, J.  
KENNARD, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

---

Unpublished Opinion XXX NP opn. filed 7/25/96 - 2d Dist., Div. 3  
Original Appeal  
Original Proceeding  
Review Granted  
Rehearing Granted

---

Opinion No. S055881  
Date Filed: August 27, 1997

---

Court: Superior  
County: Los Angeles  
Judge: Sam Cianchetti

---

**Attorneys for Appellant:**

David H. Pierce and Clifford Gardner, under appointments by the Supreme Court, for Defendant and Appellant.

---

**Attorneys for Respondent:**

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Susan D. Martynec, Pamela C. Hamanaka, Jaime L. Fuster and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

**Counsel who argued in Supreme Court (not intended for publication with opinion):**

Clifford Gardner  
Gardner & Derham  
900 North Point, Suite 220  
San Francisco, CA 94109  
(415) 922-9404

Carl N. Henry  
Deputy Attorney General  
300 South Spring Street  
Los Angeles, CA 90013  
(213) 897-2273



CERTIFICATE OF SERVICE

I, Suzanne Ryan, am over 18 years of age. My business address is Ghirardelli Square, 900 North Point, Suite 220, San Francisco, California, 94109. I am not a party to this action.

On September 25, 1997, I served the within

**PETITION FOR WRIT OF CERTIORARI**

upon the parties named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

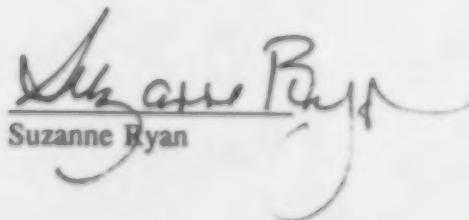
Office of the Attorney General  
300 S. Spring Street  
Los Angeles, CA 90013

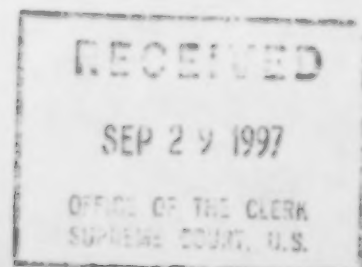
California Appellate Project  
611 Wilshire Boulevard  
2nd Floor  
Los Angeles, CA 90017

Angel Jaime Monge  
H-41271  
Pleasant Valley State Prison  
P.O. Box 8500  
Coalinga, CA 93210

I declare under penalty of perjury that the foregoing is true.

Executed on September 25, 1997, in San Francisco, California.

  
Suzanne Ryan







ORIGINAL

Supreme Court, U.S.  
FILED

DEC 17 1997

No. 97-6146

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANGEL JAIME MONGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

CAROL WENDELIN POLLACK  
Senior Assistant Attorney General

SUSAN D. MARTYNEC  
Supervising Deputy Attorney General

CARL N. HENRY  
Deputy Attorney General  
Counsel of Record

300 South Spring St.  
Los Angeles, CA 90013  
Telephone: (213) 897-2273  
Fax: (213) 897-2263

Counsel for Respondent

RECEIVED

DEC 23 1997

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

173 PP

QUESTIONS PRESENTED

Did the Supreme Court of California properly find that the truthfulness of a prior felony conviction, alleged in a noncapital case, may be relitigated without violating the Double Jeopardy Clause?

TABLE OF CONTENTS

	<u>Page</u>
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	1
STATEMENT OF THE CASE	2
MISSTATEMENT OF FACT	3
SUMMARY OF REASONS FOR DENYING THE PETITION	4
ARGUMENT	6
I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WILL NEVER COME UP ON FEDERAL HABEAS CORPUS	6
II. THE PETITION SHOULD BE DENIED BECAUSE <u>BULLINGTON</u> DID NOT CREATE A NEW RULE APPLICABLE TO NONCAPITAL SENTENCING PROCEEDINGS HELD IN STATE COURT	7
CONCLUSION	15



TABLE OF AUTHORITIESPageCases

Booth v. Maryland 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)	7
Buchanan v. Kentucky 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987)	7
Bullington v. Missouri 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981)	7-11, 13
Caspari v. Bohlen 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994)	6, 7, 11-13
Gilmore v. Taylor 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993)	7
Lowenfield v. Phelps 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)	7
Payne v. Tennessee 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)	7
Pennsylvania v. Goldhammer 474 U.S. 28, 114 S. Ct. 955, 127 L. Ed. 2d 247 (1985)	7, 11, 12
People v. Monge 16 Cal. 4th 826, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997)	7-13

TABLE OF AUTHORITIES, CONT'D

Rummel v. Estelle 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)	8, 13
Schiro v. Farley 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)	6, 7, 12
Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	12
<u>Statutes</u>	
Cal. Penal Code § 1025	10

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996  
No. 97-6146

ANGEL JAIME MONGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

OPINION OR JUDGMENT BELOW

In a 4-to-3 opinion filed August 27, 1997, the Supreme Court of California allowed Respondent to relitigate the truthfulness of Petitioner's prior felony conviction. That court held relitigation in this noncapital case would not violate the Double Jeopardy Clauses of the United States and California Constitutions. People v. Monge, 16 Cal. 4th 826, 831-45, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997). The opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as

incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County (Case No. KA025876), Petitioner was charged with the crimes of adult using a minor in violation of California Health and Safety Code section 11361(a), sale or transportation of marijuana in violation of California Health and Safety Code section 11360(a), and possession of marijuana for sale in violation of California Health and Safety Code section 11359. As to all counts, it was further alleged Petitioner suffered a prior serious or violent felony conviction within the meaning of the state's "Three Strikes Law" set forth in California Penal Code sections 667(b)-(i) (legislative version) and 1170.12(a)-(e) (initiative version). Petitioner pled not guilty and denied all special allegations. Trial was by jury. The jury found Petitioner guilty as charged. Following a bifurcated proceeding on the prior, the court found the prior true, and sentenced Petitioner to state prison for 11 years as follows: the middle term of 5 years on the adult-using-a-minor count, doubled to 10 years under the Three Strikes Law, plus a 1-year enhancement for failing to remain free from custody within the meaning of California Penal Code section 667.5(b).

The California Court of Appeal (No. B094905) affirmed the judgment of conviction, but reversed on insufficiency



grounds the trial court's true finding on the prior. The Court of Appeal remanded for resentencing. Appendix D.

The California Supreme Court reversed the Court of Appeal (No. S055881), holding Respondent could relitigate the truthfulness of Petitioner's prior because double jeopardy principles do not apply to a noncapital sentencing proceeding. Appendix A.

#### MISSTATEMENT OF FACT

Pursuant to Supreme Court Rule 15(2), Respondent is setting forth here the misstatements of fact included in the Petition.

The Petition urges "the state conceded that it had presented insufficient evidence to sustain the prior felony conviction allegation because it had failed to prove that defendant had used a weapon during the prior offense." Petition, p. 4. The foregoing misstates what actually occurred in this case.

Both at trial and in the opening brief on appeal, Petitioner failed to raise the issue now before this Court. Following appellate briefing by both parties, the California Court of Appeal, on its own motion, asked for additional briefing on the instant issue. At that point the state Attorney General conceded that if under California law (see People v. Equarte, 42 Cal. 3d 456, 459, 465, 229 Cal. Rptr. 116, 722 P.2d 890 (1986)) the District Attorney needed to prove more than what had been proffered at the bifurcated

proceeding on the prior, then the case should be remanded so that the alleged missing proof could be supplied by the District Attorney. In fact, Respondent asked the California Supreme Court to review its decision in Equarte as a preliminary matter, but the court elected not to do so. Thus, it is a misstatement of fact to say that Respondent "conceded" that the evidence was insufficient as to Petitioner's prior. Opposition, Appendix B through E.

Further, the Petition urges "the opinions below recognized" that "trial on the prior conviction enhancement at issue here has every hallmark of trial." Petition, p. 8. That is not entirely true. Indeed, the California Supreme Court's plurality opinion states, "despite some common procedural protections, the sentencing proceeding here and that in Bullington [Bullington v. Missouri, 451 U.S. 430] are more unlike than alike." Monge, 16 Cal. 4th at 837. The plurality did state "[o]n its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has 'the hallmarks of the trial on guilt or innocence.'" Id. at 836. The plurality further stated, however, "we believe Bullington's 'hallmarks of the trial' analysis does not apply here." Ibid.

#### SUMMARY OF REASONS FOR DENYING THE PETITION

In Caspari v. Bohlen, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994), this Court held the retroactivity principles of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060,

103 L. Ed. 2d 334 (1989), barred a federal court from ruling on the merits of the question presented here. Caspari, 510 U.S. at 389, 393. Thus, the California Supreme Court's decision in this case will not create any problem on federal habeas corpus.

Further, Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), did not overrule the general rule that federal double jeopardy principles do not apply to sentencing. Caspari, 510 U.S. at 391-93, 395-97; Schiro v. Farley, 510 U.S. 222, 231, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994); Pennsylvania v. Goldhammer, 474 U.S. 28, 30, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985); see Bullington, 451 U.S. at 438; United States v. DiFrancesco, 449 U.S. 117, 133, 137-38, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); North Carolina v. Pearce, 395 U.S. 711, 719-23, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Given the foregoing, certiorari should not be granted because Petitioner fails to raise an important question of federal law that should be addressed in this case. See Monge, 16 Cal. 4th at 831-43.

## ARGUMENT

### I.

THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WILL NEVER COME UP ON FEDERAL HABEAS CORPUS

Caspari states:

While our cases may not have foreclosed the application of the Double Jeopardy Clause to noncapital sentencing, neither did any of them apply the Clause in that context. On the contrary Goldhammer and Strickland [Strickland v. Washington, 466 U.S. 668 (1984)] strongly suggested that Bullington was limited to capital sentencing. We therefore conclude that a reasonable jurist reviewing our precedents at the time of respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents.

Caspari, 510 U.S. at 393 (citation omitted).

Given Caspari, the question presented here will never come up on federal habeas corpus. That being true, there is no reason to grant the writ here, except to reaffirm the general rule that double jeopardy does not apply to noncapital sentencing. Schiro, 510 U.S. at 231. A contrary ruling would unnecessarily impose a new burden on the States. "Constitutional law is not the exclusive province of the federal courts[.]" Caspari, 510 U.S. at 395.



## II.

THE PETITION SHOULD BE DENIED BECAUSE BULLINGTON DID NOT CREATE A NEW RULE APPLICABLE TO NONCAPITAL SENTENCING PROCEEDINGS HELD IN STATE COURT

If Bullington, 451 U.S. 430, had created a rule applicable to the States in noncapital sentencing proceedings, this Court obviously would have said so in Caspari, 510 U.S. 383. Caspari said, "Bullington and Rumsey were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." Caspari, 510 U.S. at 392; see Schiro, 510 U.S. at 231; Monge, 16 Cal. 4th at 837-38.

The foregoing makes sense given this Court has consistently noted the unique circumstances confronted by someone facing the penalty of death. Booth v. Maryland, 482 U.S. 496, 504, 509 n.12, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), overruled on another point in Payne v. Tennessee, 501 U.S. 808, 811, 817-30, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); see Buchanan v. Kentucky, 483 U.S. 402, 419-20, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). This Court has said the degree of federal constitutional protection which may be afforded to an accused may properly turn on whether the proceeding is capital versus noncapital. Caspari, 510 U.S. at 393; Schiro, 510 U.S. at 231; Pennsylvania v. Goldhammer, 474 U.S. 28, 30, 114 S. Ct. 955, 127 L. Ed. 2d 247 (1985); see Gilmore v. Taylor, 508 U.S. 333, 342, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993); Lowenfield v. Phelps, 484 U.S. 231, 238-39,

108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

Given the above, it makes sense that a majority of the justices of the Supreme Court of California held the federal double jeopardy clause does not apply here. Indeed, the California Supreme Court's plurality opinion in this case discusses many of this Court's decisions cited above, as well as notes the distinguishing characteristics between a truthfulness proceeding under California law versus the penalty phase proceeding at issue in Bullington. See Monge, 16 Cal. 4th at 832-43.

Citing this Court's precedent, the plurality opinion here noted "in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." Monge, 16 Cal. 4th at 832-33.

The plurality opinion reasons:

Because, in a noncapital case, a state need not provide a trial of sentencing allegations at all, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations

need not provide a jury trial. [Citations.] For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Monge, 16 Cal. 4th at 833 (emphasis in original). The foregoing appears to pass constitutional muster under this Court's precedent.

The plurality opinion notes the federal Double Jeopardy Clause "makes no express reference to sentencing determinations[,] and notes this Court has been "reluctant to apply the clause to sentencing determinations." Monge, 16 Cal. 4th at 834. The state high court opined Bullington "marked the first departure from this consistent approach[]" but that in its opinion "Bullington's 'hallmarks of the trial' analysis does not apply here." Monge, 16 Cal. 4th at 835-36. Respondent agrees.

Many of the procedural protections that applied to Petitioner rested on statutory, not federal constitutional, grounds. See Monge, 16 Cal. 4th at 833-34, 837. This is relevant because "[m]any of the elaborate procedures at the penalty phase of a capital trial originate directly in [this Court]'s decisions interpreting the federal Constitution." Monge, 16 Cal. 4th at 837. Thus,

when a state legislature has elected at its option to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the

legislature need not provide all the procedural protections that apply in a constitutionally mandated trial.

Monge, 16 Cal. 4th at 837 (emphasis in original).

The plurality opinion reasoned there are three compelling ways in which "despite some common procedural protections, the sentencing proceeding here and that in Bullington are more unlike than alike." Monge, 16 Cal. 4th at 837.

First, "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." Monge, 16 Cal. 4th at 837. For instance, unlike the death penalty sentencing procedure at issue in Bullington, a proceeding on a prior conviction allegation held pursuant to California Penal Code section 1025 "does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character." Monge, 16 Cal. 4th at 837. Indeed, a noncapital proceeding under California law "does not require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances." Ibid. Also, a noncapital proceeding under California law does not allow the trier of fact to "reject a longer sentence even if its factual determinations support the sentence." Ibid.

Second, "the financial and emotional burdens of the sentencing proceeding at issue in Bullington distinguishes



Bullington from this case." Monge, 16 Cal. 4th at 838. Bullington stressed the embarrassment, expense, ordeal, anxiety and insecurity faced by one facing death at a penalty phase are equivalent to that faced by any defendant at the guilt phase of a criminal trial. Bullington, 451 U.S. at 445; see Monge, 16 Cal. 4th at 838. Here, though a proceeding on the truth of a prior may be important to Petitioner, it must be remembered that at this point he has already been found guilty on the substantive crime. Thus, the level of his embarrassment, expense, ordeal, anxiety and insecurity at a retrial on the prior is not "equivalent" to that faced at the guilt phase of a trial. Monge, 16 Cal. 4th at 838; see Goldhammer, 474 U.S. at 30.

Indeed, a retrial on the prior is not a prosecution of an additional criminal offense; rather it is "merely a determination, for purposes of punishment, of the defendant's status, which, like age or gender, is readily determinable from the public record." Monge, 16 Cal. 4th at 838 (emphasis in original); see Caspari, 510 U.S. at 396 ("Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence").

[W]hen, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior

conviction trial is not comparable to the embarrassment of an unproved criminal charge.

Monge, 16 Cal. 4th at 838. A retrial on the prior "is simple and straightforward as compared to the guilt phase of a criminal trial." Ibid. "Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendant offers no evidence at all, and the outcome is relatively predictable." Ibid. The plurality opinion notes,

In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in Bullington.

Monge, 16 Cal. 4th at 838. Respondent agrees. See Caspari, 510 U.S. at 392-93, 396; Schiro, 510 U.S. at 231; Goldhammer, 474 U.S. at 30; Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Finally, "the nature of the issues involved at the penalty phase of a capital trial distinguishes Bullington from this case." Monge, 16 Cal. 4th at 839. In a capital case, the penalty determination "necessarily depends" on the specific facts of the defendant's present substantive offense. Ibid. At a trial on a prior, however, "the factual

determinations are generally divorced from the facts of the present offense, and the evidence does not overlap" or supplement the evidence offered at the guilt phase of the trial. Ibid. Simply put, a trial on a prior "merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant [citations], even if a prior jury has rejected the allegation [citation]." Monge, 16 Cal. 4th at 839; see Caspari, 510 U.S. at 396; see also Rummel, 445 U.S. at 268, 274, 284-85.

Given the foregoing distinctions, it is clear the California Supreme Court has properly held the Double Jeopardy Clause of the United States Constitution does not apply to noncapital sentencing proceedings. Monge, 16 Cal. 4th at 831-43. Indeed, the California Supreme Court also held the Double Jeopardy Clause of the California Constitution does not apply here. Id. at 243-45.

"Constitutional law is not the exclusive province of the federal courts[.]" Caspari, 510 U.S. at 395. Further, constitutional law "does not grow inevitably by accretion; rather, each question rises or falls on its individual merits." Monge, 16 Cal. 4th at 834. "Considering the breadth and subjectivity of the factual determinations at issue in Bullington, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here." Ibid.

Accordingly, for the above reasons, while granting certiorari would be unwarranted, it is clear the plurality opinion of the California Supreme Court in this case passes constitutional scrutiny by this Court.



CONCLUSION

Since the California Supreme Court fairly decided this case in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Dated: December 16, 1997.

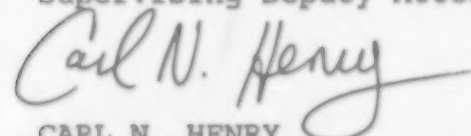
Respectfully submitted,

DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

CAROL WENDELIN POLLACK  
Senior Assistant Attorney General

SUSAN D. MARTYNEC  
Supervising Deputy Attorney General

  
CARL N. HENRY  
Deputy Attorney General  
Counsel of Record

Counsel for Respondent

**APPENDIX A**

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE, Respondent

v.

ANGEL JAIME MONGE, Appellant

SUPREME COURT  
**FILED**

OCT 30 1996

Robert Wandruff Clerk

DEPUTY

Petition for review GRANTED.

George

Chief Justice

Kennard

Associate Justice

Baxter

Associate Justice

Verdegar

Associate Justice

Brown

Associate Justice

Associate Justice

Associate Justice

COPY

SUPREME COURT  
**FILED**

AUG 27 1997

Robert Wandruff Clerk

IN THE SUPREME COURT OF CALIFORNIA C. Henr

THE PEOPLE,

Plaintiff and Respondent,

v.

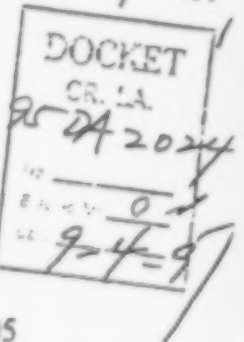
ANGEL JAIME MONGE,

Defendant and Appellant.

S055881

Ct. App. 2/3 B094905

Los Angeles County  
Super. Ct. No. KA025876



In this case, we consider the applicability of the state and federal prohibitions against double jeopardy to a proceeding to determine the truth of a prior conviction allegation. We conclude that, in this noncapital case, the state and federal prohibitions against double jeopardy do not apply. Accordingly, we reverse the judgment of the Court of Appeal to the extent that judgment bars retrial of the prior conviction allegation on double jeopardy grounds.

**FACTS AND PROCEDURAL BACKGROUND**

During the afternoon of January 25, 1995, as Pomona Police Department undercover officers were driving an unmarked car on West Ninth Street in the City of Pomona, they spotted a 13-year-old boy standing near the curb. The boy motioned the officers to pull over, but instead they pulled into an alley that led to the rear of an apartment complex where police had earlier observed narcotics activity. Once in the carport area at the rear of the complex, the officers spotted defendant Angel Jaime Monge. Defendant approached the car, and one of the officers rolled down the window and asked where he could buy marijuana. Defendant did not answer, but

SEE CONCURRING AND DISSENTING OPINIONS



walked to a carport. The officers turned their car around and then noticed the young boy who had earlier motioned them to pull over, now standing some distance behind their car. Defendant returned and gave the boy several plastic bags. The boy then approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two \$10 bills for two plastic bags of marijuana. After leaving the alley, the officers reported the sale to other Pomona officers, who arrested defendant and the boy. Police searched defendant and found the two \$10 bills that the officers had given to the boy.

The District Attorney of Los Angeles County charged defendant with using a minor to sell marijuana (Health & Saf. Code, § 11361, subd. (a)), sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and possession of marijuana for sale (Health & Saf. Code, § 11359). The district attorney also alleged defendant had suffered a prior serious felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),<sup>1</sup> and a prior prison term within the meaning of section 667.5, subdivision (b). Specifically, the district attorney alleged a July 2, 1992, conviction and prison term for assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant pleaded not guilty and denied all sentencing allegations.

Defendant waived his right to a jury trial of the prior conviction and prior prison term allegations, and the court granted his request to bifurcate determination of those allegations. A jury found defendant guilty of the substantive charges. When proceedings reconvened the following week, the court asked defense counsel if defendant wanted to admit the prior conviction, and defense counsel said, "That's correct, Your Honor." The court then asked defendant if he understood, and defendant said, "Yes." After an off-the-record discussion, the court again asked if

defendant wanted to admit the prior conviction, and defense counsel said, "No, he doesn't. He wishes the court to try the prior without the jury."

The prosecutor asserted that the prior assault conviction was a serious felony for purposes of the Three Strikes law. Defense counsel disagreed, arguing the weapon involved in the prior crime was not a deadly weapon. The court interrupted to point out that defendant had pleaded guilty to assault with "a deadly weapon" and thus had admitted the weapon was deadly. The court stated it would take judicial notice of the prior conviction and asked if the parties submitted the matter on that evidence alone. The prosecution then offered as additional evidence a "prison packet" (see § 969b) dated February 17, 1995, and an abstract of judgment. This additional evidence characterized defendant's prior conviction as "PC 245(a)(1) ADW GBI" and "ASLT W/DW (245(a)(1)PC)." Defense counsel submitted the matter after questioning whether the prosecution's documentary evidence, which included a photograph and fingerprints, related to defendant.

The court found true that defendant suffered a prior serious felony conviction, "[t]he felony being personal use of a deadly weapon in violation [of] section 245, 245(a)(1)." The court also found true the prior prison term allegation. The court imposed an eleven-year sentence, including five years for using a minor to sell marijuana, which the court doubled to ten years under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus a one-year enhancement for the prior prison term (§ 667.5, subd. (b)) and two years to run concurrently for possessing marijuana for sale. Under section 654, the court stayed the sentence for defendant's conviction of selling marijuana.

On appeal, defendant challenged the Three Strikes law as a violation of his right to due process. On its own motion, the Court of Appeal requested supplemental briefing on whether sufficient evidence supported the trial court's finding that defendant had suffered a prior serious felony conviction within the meaning of the Three Strikes law. Under the Three Strikes law, a prior felony conviction may affect

<sup>1</sup> All further statutory references are to the Penal Code.

the sentence for the present offense if the conviction was of a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Of the felonies and categories of felonies listed in section 1192.7, subdivision (c), defendant's July 2, 1992, felony conviction might have qualified as a "serious felony" under either subdivision (c)(8), which refers to "any . . . felony in which the defendant *personally* inflicts great bodily injury on any person, other than an accomplice . . .," or subdivision (c)(23), which refers to "any felony in which the defendant *personally* used a dangerous or deadly weapon." (Italics added.)

The Court of Appeal affirmed defendant's conviction, but reversed the trial court's true finding on the prior serious felony allegation, holding the evidence insufficient to establish that defendant had acted personally. In addition, the Court of Appeal held that the state and federal constitutional protections against double jeopardy barred retrial of the prior serious felony allegation. Thus, the Court of Appeal remanded for resentencing.

We granted review in order to consider whether the state and federal prohibitions against double jeopardy apply to a proceeding, in a noncapital case, to determine the truth of a prior serious felony allegation.

#### DOUBLE JEOPARDY

##### *Federal Constitution*

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Among other things, this constitutional guaranty, known as the double jeopardy clause, "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 (*Pearce*), fn. omitted.) In *Benton v. Maryland* (1969) 395 U.S. 784, 796, the Supreme Court held that the double jeopardy prohibition was " 'fundamental to the American scheme of justice' " and therefore enforceable against the states as an element of the due process protection embodied in the Fourteenth Amendment. Nevertheless, the Supreme

Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions. We have on a few occasions noted and expressly declined to decide this question. (*People v. Valladoli* (1996) 13 Cal.4th 590, 608; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8; *People v. Saunders* (1993) 5 Cal.4th 580, 593.)

At the outset we emphasize that, in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions. In *Williams v. New York* (1949) 337 U.S. 241 (*Williams*), a jury convicted the defendant of first degree murder and recommended life imprisonment. (*Id.* at pp. 242-243.) The judge, however, sentenced the defendant to death after considering the evidence "in the light of additional information obtained through the court's 'Probation Department, and through other sources.' " (*Id.* at p. 242.) Among other things, the judge noted that the defendant had been involved in " 'thirty . . . burglaries in and about the same vicinity.' " (*Id.* at p. 244.) No court had ever convicted the defendant of these 30 burglaries, but "the judge had information that [the defendant] had confessed to some and had been identified as the perpetrator of some of the others." (*Ibid.*) The judge's rather informal fact-finding procedure was consistent with applicable New York law, which permitted the sentencing court to " 'seek any information that will aid the court' " (*id.* at p. 243), including information "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine" (*id.* at p. 245).

The United States Supreme Court upheld the sentence. The high court noted that the procedural protections applicable in a trial on guilt (notice of the charges, opportunity to cross-examine adverse witnesses, opportunity to offer evidence, and representation by counsel) traditionally have not applied at sentencing. (*Williams*,



*supra*, 337 U.S. at pp. 245-246.) Historically, the court pointed out, sentencing judges could even rely on their personal knowledge of a defendant. (*Id.* at p. 246.) The court concluded, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." (*Id.* at p. 251.)

The high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht v. Patterson* (1967) 386 U.S. 605, 606. Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner v. Florida* (1977) 430 U.S. 349), it has otherwise reaffirmed *Williams* as recently as last term. (*U.S. v. Watts* (1997) \_\_\_ U.S. \_\_\_, \_\_\_ [117 S.Ct. 633, 635]; see also *Witte v. U.S.* (1995) \_\_\_ U.S. \_\_\_, \_\_\_ [115 S.Ct. 2199, 2205] ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.'"]).)

Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations need not provide a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 274, 277; *People v. Wims* (1995) 10 Cal.4th 293, 304-306; *People v. Wiley*, *supra*, 9 Cal.4th at pp. 584-585, 589.) For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Though states need not provide a trial of sentencing allegations, the California Legislature has elected to grant defendants a statutory right to a jury trial of prior conviction allegations. Section 1025 provides: "[T]he question whether or not [a defendant] has suffered [a] previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose . . . ." A survey of our decisions indicates that we have expanded section 1025's bare grant of a jury trial to include various procedural guaranties. For example, we have stated in dictum that the prosecution must prove a prior conviction allegation beyond a reasonable doubt (*People v. Tenner* (1993) 6 Cal.4th 559, 566 (*Tenner*); *In re Yurko* (1974) 10 Cal.3d 857, 862) and that the accused enjoys the privilege against self-incrimination (*In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5). Similarly, we have held that the rules of evidence apply in these trials. (*People v. Reed* (1996) 13 Cal.4th 217, 224; *People v. Myers* (1993) 5 Cal.4th 1193, 1201.) Finally, we have stated that a defendant in a trial of a prior conviction allegation has a right to " 'be confronted with witnesses against him [and] to cross-examine' " those witnesses. (*People v. Reed*, *supra*, 13 Cal.4th at p. 228, fn. 6, quoting *Specht v. Patterson*, *supra*, 386 U.S. at p. 610; *In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5.) Arguably, the next step in the logical progression of these decisions is for us now to hold that the constitutional protections against double jeopardy apply. Constitutional law, however, does not grow inevitably by accretion; rather, each question rises or falls on its individual merits.

With this point in mind, we turn to an analysis of the double jeopardy clause of the federal Constitution. The double jeopardy clause by its terms proscribes a second jeopardy "for the same *offense*." (U.S. Const., 5th Amend., *italics added*.) The clause makes no express reference to sentencing determinations. Our review of the Supreme Court's decisions indicates that court is reluctant to apply the clause to sentencing determinations. In *Stroud v. United States* (1919) 251 U.S. 15 (*Stroud*), a jury found the defendant guilty of first degree murder " 'without capital

punishment," which was one of its options under the applicable statute. (*Id.* at pp. 17, 18.) After the Supreme Court reversed that judgment, a jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. (*Id.* at p. 17.) The Supreme Court held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the court did not consider the verdict of "guilty . . . 'without capital punishment'" as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." (*Id.* at p. 18.)

The Supreme Court reaffirmed *Stroud* in *Pearce*, *supra*, 395 U.S. at page 720. In *Pearce*, the court resolved two cases in which the defendants successfully challenged their convictions, only to receive longer overall sentences following retrials. Moreover, neither defendant received credit for time served. (*Id.* at pp. 713-715.) The Supreme Court held that the double jeopardy clause entitled the defendants to credit for time served. (*Id.* at pp. 718-719.) Nevertheless, the double jeopardy clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." (*Id.* at p. 719.)

In *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 23-24, in which the jury imposed the sentence instead of the judge, the Supreme Court, without discussion, again reaffirmed that the double jeopardy clause does not preclude a longer sentence following retrial. Finally, in *United States v. DiFrancesco* (1980) 449 U.S. 117 (*DiFrancesco*), the high court considered a statutory sentencing scheme that allowed the federal court of appeals to review the sentence that the federal district court had imposed and, at the prosecution's request, to increase that sentence "after considering the record" and "after hearing." (*Id.* at p. 120, fn. 2.) The high court determined that

this scheme did not violate the double jeopardy clause, noting that "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*Id.* at p. 133.)

Thus, in a variety of contexts, the Supreme Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings. *Bullington v. Missouri* (1981) 451 U.S. 430 (*Bullington*) marked the first departure from this consistent approach.

*Bullington* concerned imposition of the death penalty under Missouri law. In accord with the Supreme Court's decisions in *Furman v. Georgia* (1972) 408 U.S. 238, *Gregg v. Georgia* (1976) 428 U.S. 153, and the capital cases decided on the same day as *Gregg*, Missouri's death penalty statute included intricate procedural safeguards. For example, the trial court had to conduct a separate presentence hearing for a defendant convicted of capital murder. The hearing had to be held before the same jury that found the defendant guilty. At the hearing, the jury considered additional evidence and determined whether any aggravating or mitigating circumstances existed, whether the aggravating circumstances warranted the death penalty, and whether the mitigating circumstances outweighed the aggravating circumstances. The jury had to make its findings beyond a reasonable doubt. Finally, the court had to instruct the jury that it need not impose the death penalty even if it found sufficient aggravating circumstances that mitigating circumstances did not outweigh. (*Bullington, supra*, 451 U.S. at pp. 433-435.)

A Missouri jury convicted Robert Bullington of capital murder. As required, the court held a presentence hearing, and the jury returned a verdict of "imprisonment for life without eligibility for probation or parole for 50 years." (*Bullington, supra*, 451 U.S. at p. 436.) The trial court then granted Bullington's motion for a new trial, finding error in jury selection. Despite the Supreme Court's decision in *Stroud, supra*, 251 U.S. 15, the court also ruled, on double jeopardy grounds, that the prosecution could not seek the death penalty on retrial. (*Bullington, supra*, 451 U.S.



at p. 436.) The prosecution petitioned for a writ of prohibition or mandamus, and the state supreme court granted the writ, holding that double jeopardy principles did not bar the prosecution from seeking the death penalty. (*Id.* at pp. 436-437.) The United States Supreme Court reversed, holding that the double jeopardy clause did bar imposition of the death penalty. (*Id.* at pp. 446-447.) Noting that, under the applicable Missouri death penalty law, the jury determined the sentence at "a separate hearing" and did not have "unbounded discretion," but rather chose "between two alternatives," and that "the prosecution . . . undertook the burden of establishing certain facts beyond a reasonable doubt" (*id.* at p. 438), the high court reasoned that the penalty phase of a Missouri capital trial had "the hallmarks of the trial on guilt or innocence" (*id.* at p. 439) and therefore that the double jeopardy prohibition applied (*id.* at pp. 438, 446). The court reaffirmed *Bullington* in *Arizona v. Rumsey* (1984) 467 U.S. 203, 212, a case in which the judge, not the jury, determined the appropriate sentence.

On its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has "the hallmarks of the trial on guilt or innocence." Thus, the defendant has a right to counsel, notice, and an opportunity to be heard. (*Oyler v. Boles* (1962) 368 U.S. 448, 452.) The prosecution must "plead and prove" the prior conviction allegation (§§ 667, subds. (c) and (g), 1170.12, subds. (a) and (e)) at a "trial" (§ 1025). The prosecution has the burden of proof beyond a reasonable doubt. (*Tenner, supra*, 6 Cal.4th at p. 566.) Finally, the trier of fact faces a choice between two alternatives. (§ 1158.) Nevertheless, for reasons we discuss below, we believe *Bullington*'s "hallmarks of the trial" analysis does not apply here.

Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania v. Goldhammer* (1985) 474 U.S. 28, the court reaffirmed that its decisions " 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.' " (*Id.* at p. 30, bracketed language in *Goldhammer*, italics

added.) Similarly, in *Caspari v. Bohlen*, the court noted that *Bullington* "was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari v. Bohlen* (1994) 510 U.S. 383, 392 (*Caspari*)). The court added: "*Goldhammer* and *Strickland* [*v. Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* was limited to capital sentencing." (*Caspari, supra*, 510 U.S. at p. 393.)

Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decisions interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected *at its option* to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial.

Furthermore, despite some common procedural protections, the sentencing proceeding here and that in *Bullington* are more unlike than alike. First, the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases. Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character. A section 1025 trial does not then require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances. Nor does a section 1025 trial allow the trier of fact to reject a longer sentence even if its factual determinations support the sentence. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here.

In deciding *Bullington*, the court reaffirmed the general rule that the double jeopardy clause does not apply to sentencing proceedings. (*Bullington, supra*, 451 U.S. at p. 438.) The court then carved out a narrow exception to this general rule. (*Ibid.*) The court did not overrule *Stroud, supra*, 251 U.S. 15, which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. (*Bullington, supra*, 451 U.S. at p. 446.) Most of those procedural safeguards are unique to death penalty determinations and simply do not apply here.

Second, the financial and emotional burden of the sentencing proceeding at issue in *Bullington* distinguishes *Bullington* from this case. The court in *Bullington* stressed that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." (*Bullington, supra*, 451 U.S. at p. 445.) By comparison, though a trial of prior conviction allegations is undoubtedly *important* to a defendant—possibly increasing a short prison term to a life term—the level of embarrassment, expense, and anxiety involved is not "equivalent to that faced . . . at the guilt phase" of the trial. (*Ibid.*) This lesser financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence.

The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which, like age or gender, is readily determinable from the public record. Moreover, when, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. Finally, a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often

it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in *Bullington*.

Even when, as here, the prior conviction trial involves some factual point relating to the prior crime, such as whether the defendant acted personally, the proceeding is not like "the trial on guilt" (*Bullington, supra*, 451 U.S. at p. 439), because the prosecution may only present evidence from the *record* of the prior conviction (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*)). The defendant, and any member of the public, can review that record before the prior conviction trial and accurately forecast the trial's outcome. When a trial, even a very important trial, is short and readily predictable in this way, the defendant suffers correspondingly less embarrassment, expense, and anxiety. Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. For these reasons, we conclude the financial and emotional burden of a prior conviction trial is minor as compared to a guilt trial. (Cf. *DiFrancesco, supra*, 449 U.S. at p. 136 ["The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him."].)

Third, the nature of the issues involved at the penalty phase of a capital trial distinguishes *Bullington* from this case. The sentence determination in a capital case necessarily depends on the specific facts of the defendant's present crime, as well as an overall assessment of the defendant's character. The evidence usually overlaps or supplements the evidence offered at the guilt phase of the trial. On the other hand, in



a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all. Like a trial in which the defendant's age or gender is at issue, the prior conviction trial merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant (*People v. Biggs* (1937) 9 Cal.2d 508, 512; *People v. Dutton* (1937) 9 Cal.2d 505, 507), even if a prior jury has rejected the allegation (*People v. Rice* (1988) 200 Cal.App.3d 647, 654-656). If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. (*Ibid.*) "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." (*Durham v. State* (Ind. 1984) 464 N.E.2d 321, 324.)

Given these distinctions, we do not believe *Bullington* requires application of the double jeopardy clause to all sentencing proceedings that have "the hallmarks of the trial on guilt or innocence." (*Bullington, supra*, 451 U.S. at p. 439.) Nevertheless, other state courts and the federal circuit courts are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here. Some courts conclude that, where the prior conviction determination involves a trial-like proceeding at which the prosecution has the burden of proving certain disputed facts, a negative finding is tantamount to an acquittal of the facts necessary to establish a longer sentence, and double jeopardy protections bar retrial. (See, e.g., *Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109, 113, revd. on other grounds in *Caspari, supra*, 510 U.S. at pp. 396-397; *Durosko v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368, 371; *People v. Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514; *State v. Hennings* (1983) 100 Wn.2d 379, 386-390 [670 P.2d 256, 259-262].) These courts, however, do not fully appreciate the unique nature and constitutional origins of capital sentencing proceedings as compared to

prior conviction proceedings. Accordingly, we find more persuasive those decisions involving noncapital sentencing proceedings in which courts found the federal double jeopardy clause did not apply. (See, e.g., *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1274 ["We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."]; *Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144, 148 ["We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376 [The habitual criminal proceeding "is an inquiry as to whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."]; *Durham v. State, supra*, 464 N.E.2d at p. 324 ["The habitual offender status . . . is a continuing status of a particular defendant . . . . The state may use this status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."]; *State v. Cobb* (Mo. 1994) 875 S.W.2d 533, 536 ["The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."]; *State v. Aragon* (1993) 116 N.M. 267, 271 [861 P.2d 948, 952] ["Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."]; cf. *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451, 456 ["[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."]; *U.S. v. Rodriguez-Gonzalez* (2d Cir. 1990) 899 F.2d 177, 181 ["Reliance on . . . *Bullington* is inapposite . . . since [that] case[] arose in the unique context of capital sentencing."]; *People v. Levin* (Ill. 1993) 623 N.E.2d 317, 325 ["We conclude that the separate

hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."]; *People v. Sailor* (1985) 65 N.Y.2d 224, 231-236 [480 N.E.2d 701, 708] ["[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender . . ."]; but see *Perkins v. State* (Ind. 1989) 542 N.E.2d 549, 551-552 [overruling *Durham v. State*, *supra*, 464 N.E.2d 321, but relying on a clear misreading of *Lockhart v. Nelson* (1988) 488 U.S. 33, 37-38, fn. 6].)

Our conclusion finds some support in the high court's most recent discussion of the issue in *Caspari*, *supra*, 510 U.S. 383. In *Caspari*, as in this case, the state court of appeals reversed a sentence because the record contained insufficient evidence that the defendant was a "persistent offender." (*Id.* at pp. 386-387.) On remand, the prosecution offered additional evidence, and the trial court imposed the same sentence. The state court of appeals affirmed the sentence, concluding that the federal double jeopardy clause does not apply to sentencing proceedings and therefore did not bar retrial of the persistent offender issue. (*State v. Bohlen* (Mo. 1985) 698 S.W.2d 577, 578.) The defendant subsequently petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but the federal court of appeals reversed, holding that the double jeopardy clause does apply to noncapital sentencing proceedings. The Supreme Court granted certiorari. (*Caspari*, *supra*, 510 U.S. at pp. 387-388.)

In deciding *Caspari*, the Supreme Court applied *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*), which held that new rules of constitutional law do not generally apply retroactively so as to permit reopening of final convictions by way of habeas corpus petitions. The *Caspari* court reasoned that, if application of the federal double jeopardy clause to noncapital sentencing proceedings would constitute a "new constitutional rule of criminal procedure" that would "break[] new ground or

impose[] a new obligation on the States" (*Teague*, *supra*, 489 U.S. at pp. 299, 301 (plur. opn. of O'Connor, J.)), then the district court correctly denied the writ of habeas corpus. (*Caspari*, *supra*, 510 U.S. at p. 390.) The court noted its historic refusal to apply the double jeopardy clause to sentencing proceedings, with the only exception being capital sentencing proceedings such as the one at issue in *Bullington*. (*Caspari*, *supra*, 510 U.S. at pp. 391-392.) The court then compared sentencing proceedings in noncapital cases to those in capital cases. Noting that sentencing in a capital case is unique and that procedural safeguards apply in capital cases that do not apply in other cases (*id.* at pp. 392-393), the court concluded "that the [federal] Court of Appeals announced a new rule in this case" by extending *Bullington* to noncapital cases (*Caspari*, *supra*, 510 U.S. at p. 395). Accordingly, the defendant's sentence was "'consistent with established constitutional standards'" as of the time the sentence became final (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)), quoting *Desist v. United States* (1969) 394 U.S. 244, 262-263 (dis. opn. of Harlan, J.)), and the federal court of appeals erred in directing the district court to grant the writ (*Caspari*, *supra*, 510 U.S. at pp. 396-397).

Given this conclusion, the high court declined to decide whether the double jeopardy clause applies to noncapital sentencing proceedings. (*Caspari*, *supra*, 510 U.S. at p. 397.) Nevertheless, the court confirmed that none of its decisions applies the clause in that context. Indeed, the court asserted that "a reasonable jurist reviewing our precedents" would not conclude otherwise. (*Id.* at p. 393.) Thus, though we do not know how the Supreme Court would resolve the issue now before us, we do know that, like the sentence imposed in *Caspari*, the sentence here is "'consistent with established constitutional standards.'" (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)). Furthermore, *Caspari* highlights the basic flaw of the dissent's reasoning. The premise of the dissent is that *Bullington* requires application of the federal double jeopardy clause whenever a sentencing proceeding, whether capital or noncapital, has "the hallmarks of the trial on guilt or innocence."



(*Bullington*, *supra*, 451 U.S. at p. 439.) The Missouri persistent offender statutes at issue in *Caspari*, like section 1025, created a proceeding with all these “hallmarks,” including proof beyond a reasonable doubt. (*Bohlen v. Caspari*, *supra*, 979 F.2d at pp. 112-113.) If the dissent’s articulation of *Bullington*’s holding were correct, then the Court of Appeals’ decision in *Caspari*, barring retrial of the persistent offender issue, would have constituted a straight application of established precedent. The high court would not have found that retrial was “ ‘consistent with established constitutional standards’ ” (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O’Connor, J.)), and the high court would not have concluded “that the Court of Appeals announced a new rule in this case.” (*Caspari*, *supra*, 510 U.S. at p. 395.) In light of *Caspari*, *Bullington* simply does not dictate the result in this case.

Finally, the *Caspari* court suggested that, if faced with the issue, it would find the double jeopardy clause inapplicable to the sentencing determination involved here. “Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.” (*Caspari*, *supra*, 510 U.S. at p. 396.)

In conclusion, we hold that the federal double jeopardy clause does not apply to the trial of the prior conviction allegation in this case.

Of course, in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, footnote 22, we applied double jeopardy protections to bar retrial of a sentence-enhancing allegation in a noncapital case, saying: “The jury’s rejection [of the allegation] constituted an express acquittal on the enhancement and forecloses any retrial.” In *Marks*, we relied primarily on the Court of Appeal decision in *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, which in turn relied on *People v. Henderson* (1963) 60 Cal.2d 482 and *People v. Collins* (1978) 21 Cal.3d 208.

*Henderson*, which we reaffirmed in *Collins*, held that, when a defendant successfully challenges his conviction, the state double jeopardy clause prohibits imposition of a greater sentence following retrial, thus preventing an “unreasonabl[e] impair[ment]” of “[a] defendant’s right of appeal from an erroneous judgment.” (*People v. Henderson*, *supra*, 60 Cal.2d at p. 497; see also *People v. Collins*, *supra*, 21 Cal.3d at p. 216; *People v. Hood* (1969) 1 Cal.3d 444, 459; *People v. Ali* (1967) 66 Cal.2d 277, 281.) Our reference in *Marks* to “an express acquittal on the enhancement” might suggest a broader holding than mere application of *Henderson* and its progeny, but because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 914, fn. 4 [stating the policy underlying *Henderson* as a reason for barring retrial of enhancements].)<sup>2</sup> Because we based our decision in *Marks* on an interpretation of the California Constitution that is not relevant here, *Marks* has no bearing upon our interpretation of the federal Constitution.

#### *California Constitution*

We must also determine whether the double jeopardy protection of the California Constitution bars retrial of the prior conviction allegation in this case. The state Constitution provides that “[p]ersons may not twice be put in jeopardy for the same offense.” (Cal. Const., art. I, § 15.) By comparison, the federal Constitution provides that “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.” (U.S. Const., 5th Amend.) The “California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants’ rights than that extended by the federal Constitution . . . .” (*People v. Fields* (1996) 13 Cal.4th 289, 298.) Nevertheless, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, “ ‘coherent reasons must exist’ ” before we will construe the

<sup>2</sup> Whether *Marks* correctly applied the *Henderson* rule is not before us.

Constitutions differently and “ ‘depart from the construction placed by the Supreme Court of the United States.’ ” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.)

The purpose behind the state and federal double jeopardy provisions is the same. Like decisions interpreting the federal double jeopardy clause, “[d]ecisions under the double jeopardy clause of the California Constitution . . . recognize the defendant’s interest in avoiding both the stress of repeated prosecutions and the enhanced risk of erroneous conviction.” (*People v. Fields, supra*, 13 Cal.4th at p. 298.) In certain contexts, this court has decided that, in furthering this purpose, the state double jeopardy clause provides greater protection than its federal counterpart. The rule, which we already discussed, protecting defendants from receiving a greater sentence if reconvicted after a successful appeal (see *People v. Collins, supra*, 21 Cal.3d at p. 216; *People v. Hood, supra*, 1 Cal.3d at p. 459; *People v. Ali, supra*, 66 Cal.2d at p. 281; *People v. Henderson, supra*, 60 Cal.2d at pp. 495-497) is one instance where we have interpreted the state double jeopardy clause more broadly than the federal clause. (Cf. *Pearce, supra*, 395 U.S. at pp. 719-721 [finding no violation of the federal double jeopardy clause under similar circumstances].) A second instance is the rule prohibiting retrial after the trial court has declared a mistrial without the defendant’s consent. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-718; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275-276; cf. *Gori v. United States* (1961) 367 U.S. 364, 365 [finding no violation of the federal double jeopardy clause under similar circumstances].)

Under the circumstances of the present case, we find no reason to construe the California Constitution to afford greater protection than the federal Constitution. As we described above, though the effect on a defendant’s sentence may be significant, the embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant’s present offense, not an allegation of a prior

conviction. The trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable. We see no reason, in the present context, to interpret the state Constitution differently from the federal. (Cf. *People v. Saunders, supra*, 5 Cal.4th at p. 596.) Accordingly, we conclude that the double jeopardy provision of the state Constitution does not apply to the trial of the prior conviction allegation in this case. (Cf. *People v. Morton* (1953) 41 Cal.2d 536 [permitting retrial of a prior conviction allegation under facts similar to those here, but without discussing double jeopardy].)

#### CONCLUSION

We conclude that the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case. Of course, this conclusion raises numerous secondary issues. For example, the Court of Appeal’s determination that the evidence was insufficient to prove defendant’s prior conviction was of a serious felony is, at the very least, the law of this case. Thus, the prosecution would have to present additional evidence at a retrial of the prior conviction allegation in order to obtain a different result. What limitations might apply to this additional evidence (other than the limitations we identified in *People v. Reed, supra*, 13 Cal.4th 217, and *Guerrero, supra*, 44 Cal.3d 343), we do not decide, because the Court of Appeal did not address that issue. For the same reason, we express no opinion about whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints. Finally, we express no opinion about whether due process protections preclude the prosecution from retrying the prior conviction allegation. (Cf. *Pearce, supra*, 395 U.S. at pp. 723-724; *Blackledge v. Perry* (1974) 417 U.S. 21, 28-29.)



Because the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case, we reverse the judgment of the Court of Appeal to the extent it barred retrial of that allegation on double jeopardy grounds.

CHIN, J.

WE CONCUR:

GEORGE, C.J.  
BAXTER, J.

C O P Y

THE PEOPLE v. ANGEL JAIME MONGE

S055881

CONCURRING OPINION BY BROWN, J.

I concur in the result, although I would favor a more cautious approach. The double jeopardy clause has proven singularly difficult to apply and remains one of the most " 'misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion.' " (Westen & Drubel, *Toward a General Theory of Double Jeopardy* (1978) Sup.Ct. Rev. 81, 82, fn. 6.)

While acknowledging that its precedents could hardly be characterized as "models of consistency and clarity" (*Burks v. United States* (1978) 437 U.S. 1, 9), the United State Supreme Court has held the prosecution is not entitled to retrial when a conviction is reversed for insufficient evidence. (*Id.* at pp. 9-11.) The question in this case is whether the prosecution is similarly barred from retrying a prior-conviction-sentence enhancement allegation when the true finding is reversed for insufficient evidence.

This is a question the high court has never specifically addressed. (*Bullington v. Missouri* (1981) 451 U.S. 430, 445; *Caspari v. Bohlen* (1994) 510 U.S. 383, 397.) In *Bullington*, the court considered whether the double jeopardy clause barred the prosecution from seeking the death penalty on retrial following reversal of an earlier conviction imposing a lesser penalty. *Bullington* marked the first time the court had applied the double jeopardy clause to a sentencing determination. (*Bullington v. Missouri, supra*, at p. 438.)

*Bullington's* characterization of the first jury's decision to impose life imprisonment as an acquittal of " 'whatever was necessary to impose the death sentence' " (*Bullington v. Missouri, supra*, 451 U.S. at p. 445, quoting *State ex rel. Westfall v. Mason* (Mo.Sup.Ct. 1980) 594 S.W.2d 908, 922 (dis. opn. of Bardgett, C.J.)), is strongly reminiscent of the court's decision in *Green v. United States* (1957) 355 U.S. 184. In *Green*, the court held the double jeopardy clause barred retrial of a greater offense after the jury at the defendant's first trial convicted him of the lesser included offense. (*Id.* at p. 191.) In both settings, the failure of the prosecution to prove its greatest charge implicated a failure to prove the case-in-chief. Characterizing the failure of proof as an acquittal under these circumstances is fully consistent with the objectives of the double jeopardy clause in that it protects a defendant charged with a crime from being forced to "run the gantlet . . . on that charge" (*id.* at p. 190) more than once.

While the United States Supreme Court's cases have not "foreclosed the application of the Double Jeopardy Clause to noncapital sentencing" (*Caspari v. Bohlen, supra*, 510 U.S. at p. 393), none has applied the clause in that particular context, and the question remains unresolved. In the wake of *Bullington* and *Caspari* considerable confusion exists, but a few propositions seem clear. First, the double jeopardy clause does apply to some sentencing proceedings; second, where the clause applies, its sweep is absolute and there can be no balancing of the equities; and finally, application of double jeopardy does not depend on the mechanical application of a formula. It depends instead on the nature of the determination to be made and its relationship to the underlying offense.

As the court stated in *Caspari*: "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair, and will enhance the accuracy of the proceeding by

ensuring that the determination is made on the basis of competent evidence." (*Caspari v. Bohlen, supra*, 510 U.S. at pp. 396-397.)

Other jurisdictions have found the reasoning of *Bullington* inapplicable where the facts at issue in the sentencing determination have no bearing on facts relating to the present crime. (*Denton v. Duckworth* (7th Cir. 1989) 144, 148 [unlike death penalty determination in *Bullington*, habitual offender statute does not require consideration of facts underlying substantive offense]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 375 [same]; *People v. Sailor* (N.Y.App. 1985) 480 N.E.2d 701, 707 [*Bullington* implicitly recognizes death penalty was part of substantive offense of murder].)

When the prosecutor fails to prove a prior conviction allegation, a retrial does not require a factfinder to reevaluate the evidence underlying the substantive offense. Under these circumstances a retrial does not subject a defendant to the risk of repeated prosecution within the meaning of the double jeopardy clause.

BROWN, J.



COPY

PEOPLE v. MONGE

S055881

DISSENTING OPINION BY WERDEGAR, J.

I dissent. With due respect, I believe the majority fails to appreciate the import of the United States Supreme Court decisions touching on this difficult issue, especially the meaning of *Bullington v. Missouri* (1981) 451 U.S. 430 (hereafter sometimes *Bullington*). As I explain, *Bullington* and its progeny compel a conclusion that the federal double jeopardy clause precludes the People from retrying the prior felony conviction allegation in this case. Moreover, even assuming the federal double jeopardy clause does not apply here, I conclude the double jeopardy clause of the state Constitution (Cal. Const., art. I, § 15) protects Californians from multiple retrials of sentence enhancement allegations, at least as the statutory law concerning such enhancement allegations is now written.

I. DOUBLE JEOPARDY UNDER THE FEDERAL CONSTITUTION

As the majority correctly recognizes, "the Supreme Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions." (Lead opn., *ante*, p. 5; conc. opn. of Brown, J., *ante*, p. 1 ["This is a question the high court has never specifically addressed."].) The persuasive force of this observation, however, is diminished by the fact the high court also has never held the reverse, i.e., it has never held the double

jeopardy clause is *inapplicable* to all noncapital sentencing proceedings. Just as we have avoided resolving this issue (*People v. Valladolid* (1996) 13 Cal.4th 590, 608 [assuming without deciding double jeopardy protections apply to prior conviction enhancement allegations]; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8 [need not decide the issue]), the United States Supreme Court has similarly managed to avoid a definitive decision on the issue. The most recent example of this avoidant behavior is *Caspari v. Bohlen* (1994) 510 U.S. 383 (hereafter *Caspari*), in which the high court explained that "[b]ecause of our resolution of this case on Teague<sup>1</sup> grounds, we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing . . . ." (*Caspari, supra* at p. 397 [127 L.Ed.2d at p. 250]; see also *Lockhart v. Nelson* (1988) 488 U.S. 33, 37, fn. 6 [because state conceded the issue, court "assume[d], without deciding" double jeopardy applied to noncapital sentencing proceedings]; *Hunt v. New York* (1991) 502 U.S. 964 (opn. by White, J. dis. from den. of cert.) [arguing high court should grant certiorari to resolve split in authority concerning the "key question . . . whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in noncapital cases"].) As I explain, although the slate is not entirely a clean one, the majority misapprehends the importance of *Bullington, supra*, 451 U.S. 430, and its progeny.

I begin with first principles. The Fifth Amendment provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This provision was made applicable to the states through the Fourteenth Amendment by the Supreme Court's decision in *Benton v. Maryland* (1969) 395 U.S. 784. The federal double jeopardy clause "protects against a second

<sup>1</sup> See *Teague v. Lane* (1989) 489 U.S. 288, governing the retroactivity of newly-announced rules to cases proceeding via habeas corpus in the federal courts.

prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717, fn. omitted.) "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.)

The general rule is that the federal double jeopardy prohibition does not operate to prevent a retrial following reversal of the judgment on appeal. (*North Carolina v. Pearce*, *supra*, 395 U.S. at pp. 719-720; *United States v. Tateo* (1964) 377 U.S. 463, 465.) An important exception to this general rule, however, applies when the judgment is reversed for insufficient evidence. (*Burks v. United States* (1978) 437 U.S. 1 [hereafter *Burks*].) In such cases, retrial is barred by the federal double jeopardy clause because "the prosecution . . . has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (*Id.*, at p. 16.) Inasmuch as *Burks* delineates the scope of federal constitutional law, we have consistently followed the rule set forth in that case. (See *People v. Trevino* (1985) 39 Cal.3d 667, 694-699, disapproved on another ground, *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1221; *People*

*v. Belton* (1979) 23 Cal.3d 516, 526-527 & fn. 13; see generally 1 Witkin & Epstein, *Cal. Criminal Law* (2d ed. 1988) Defenses, § 319(b), pp. 368-369 ["The *Burks* rule has been adhered to by the California courts"].)

The Court of Appeal in this case reversed the jury's finding on the alleged prior serious felony conviction, explaining the People failed to produce sufficient evidence defendant personally inflicted great bodily injury or personally used a weapon in the prior crime. This was not a reversal for mere trial error such as the erroneous admission or exclusion of evidence at trial. Instead, the appellate court's action was a reversal for insufficient evidence. If the federal double jeopardy clause applies to sentence enhancements generally, or to the particular enhancement at issue in this case (i.e., Pen. Code, §§ 667, subds. (b)-(i) [legislative "Three Strikes" law], 1170.12, subds. (a)-(d) [initiative "Three Strikes" law]), the *Burks* rule would prohibit retrial of the enhancement allegation. The lead opinion reasons the *Burks* rule does not apply, finding the federal double jeopardy clause inapplicable to sentencing hearings unless the death penalty is involved. As I explain, the lead opinion's reading of applicable Supreme Court precedent is flawed.

The lead opinion is correct that double jeopardy protections do not apply to traditional criminal sentencing proceedings. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*United States v. DiFrancesco* (1980) 449 U.S. 117, 133 [hereafter *DiFrancesco*].) Most recently, the high court explained that "[t]raditionally, '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.' *Nichols v. United States*, 511 U.S. 738, 747; 128 L.Ed.2d 745[, 754] (1994). We explained in *Williams v. New York*, 337 U.S. 241, 246 (1949), that 'both before and since the American colonies became a nation, courts



in this country and in England practiced a policy under which a sentencing judge could exercise wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' " (*Witte v. United States* (1995) 515 U.S. 389, 397-398 [132 L.Ed.2d 351, 362-363].) "Against this background of sentencing history, we specifically have rejected the claims that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime." (*Id.*, at p. 398 [132 L.Ed.2d at p. 363].)

We, of course, have such "traditional" sentencing proceedings in California. Following the jury's verdict, the trial court must set a hearing within 20 judicial days of verdict for pronouncement of judgment. (Pen. Code, § 1191.) At this hearing, the trial judge considers the probation report (see Cal. Rules of Court, rules 411 [presentence investigations and reports], 411.5 [probation officer's presentence investigation report]) and exercises broad discretion in deciding whether probation is justified as a sentencing option (*id.*, rule 414 [criteria affecting probation]), in selecting the base term (*id.*, rule 420) and in choosing whether to impose concurrent or consecutive terms (*id.*, rule 425 [criteria affecting concurrent or consecutive sentences]). In making these determinations, the trial judge considers the circumstances in aggravation (*id.*, rule 421) and in mitigation (*id.*, rule 423), which need not be either pleaded or proved by the People. (See generally, *People v. Hernandez* (1988) 46 Cal.3d 194, 204-206 [noting difference between "a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed"]; *People v. Betterton* (1979) 93 Cal.App.3d 406 ["full panoply of rights" not required in sentencing hearing]; *People v. Thomas* (1979) 87 Cal.App.3d 1014 [Cal. Rules of Court intended to guide sentencing

courts, not give notice of prohibited acts].) In most cases, the number of potential sentencing dispositions and permutations is great, as is the discretion of the sentencing judge. Such "traditional" sentencing proceedings are not at issue in this case, and I agree double jeopardy principles do not apply to proceedings of this type.

As is apparent, "traditional" sentencing proceedings are held without a jury, permit consideration of probation reports and involve broad sentencing court discretion to choose among a variety of outcomes. Such hearings must be distinguished from the type of criminal sentencing hearing that follows the trial on the substantive criminal offenses and is addressed typically (but not exclusively) to the existence of enhancements. In this latter type of hearing, formal notice of the sentence enhancement allegation must be given, a jury determines historical facts that can lead to enhanced or longer sentences, the People bear the burden of proof beyond a reasonable doubt by admissible evidence, and the sentencer must choose one of two outcomes. This latter type of sentencing hearing constitutes a separate trial or a "trial-like" proceeding on punishment. As I explain, the lesson of *Bullington v. Missouri*, *supra*, 451 U.S. 430, and its progeny is that in such cases, federal double jeopardy protections apply.

#### A. *Bullington* and its Progeny

*Bullington* involved a defendant convicted in Missouri of capital murder. Under Missouri law, the defendant in *Bullington* was entitled to a separate presentence hearing on the question of penalty. State law guaranteed him the following procedural rights at that hearing: the same jury that found him guilty of murder would hear additional evidence; notice of the aggravating evidence must be given; the jury must consider 10 aggravating and 6 mitigating factors specified by law; the jury must weigh the various factors and identify in writing which factors it found proved beyond a reasonable doubt; the jury must find that the

aggravating evidence warrants imposition of the death penalty beyond a reasonable doubt; and the jury's decision must be unanimous. (*Bullington supra*, 451 U.S. at pp. 433-434.) After a presentence hearing, the jury eschewed the death penalty and imposed on the defendant a sentence of life with no parole for 50 years.

The defendant in *Bullington* then moved for judgment of acquittal or for a new trial. When the trial court granted the new trial motion, the prosecution announced its decision that, during the retrial, it would again seek the death penalty. The defendant objected, citing the federal double jeopardy clause, and the high court agreed. The Supreme Court first noted that it "has resisted attempts to extend [double jeopardy principles] to sentencing. The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." (*Bullington, supra*, 451 U.S. at p. 438.) For this proposition, the high court cited the cases on which the lead opinion relies, i.e., *North Carolina v. Pearce, supra*, 395 U.S. 711, *DiFrancesco, supra*, 449 U.S. 117, *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, *Stroud v. United States* (1919) 251 U.S. 15 (hereafter *Stroud*).

The *Bullington* court declined, however, to follow this line of reasoning. Because its explanation for diverging from the previous rule is critical to this case, I quote it extensively:

"The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner *Bullington* at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was *not given unbounded discretion* to select an appropriate punishment from a

wide range authorized by statute. Rather, *a separate hearing was required* and was held, and the jury was presented both a *choice between two alternatives and standards to guide the making of that choice*. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the *burden of establishing certain facts beyond a reasonable doubt* in its quest to obtain the harsher of the two alternative verdicts. *The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.*

"In contrast, the sentencing procedures considered in the Court's previous cases *did not have the hallmarks of the trial on guilt or innocence*. In *Pearce*, *Chaffin* and *Stroud*, there was no separate sentencing proceeding at which the prosecution was required to prove — beyond a reasonable doubt or otherwise — additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud*, no standards had been enacted to guide the jury's discretion. In *Pearce*, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in *Chaffin*, the discretion given to the jury was extremely broad. That defendant, convicted in Georgia of robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. [Citation.] The statute contained no standards to guide the jury's exercise of its discretion." (*Bullington, supra*, 451 U.S. at pp. 438-440, italics added, fns. omitted.)

"In the usual sentencing proceeding, however, it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' In the normal process of sentencing, 'there are virtually no rules or tests or standards — and thus no issues



to resolve. . . .’ M. Frankel, *Criminal Sentences: Law Without Order* 38 (1973). Thus, ‘[t]he discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance. Where the judge has power to select a term of imprisonment within a range the exercise of that authority is left fairly at large.’ Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 *Harv.L.Rev.* 904, 916 (1962).” (*Bullington, supra*, 451 U.S. at pp. 443-444, fn. omitted.)

“By enacting a capital sentencing procedure *that resembles a trial on the issue of guilt or innocence*, however, Missouri explicitly requires the jury to determine whether the prosecution has ‘proved its case.’ . . . [W]e therefore refrain from extending the rationale of *Pearce* to the very different facts of the present case. Chief Justice Bardgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that ‘the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.’ 594 S.W.2d, at 922. We agree.” (*Bullington, supra*, 451 U.S. at pp. 444-445, italics added.) “Having received ‘one fair opportunity to offer whatever proof it could assemble,’ [citation], the State is not entitled to another.” (*Id.*, at p. 446, quoting *Burks, supra*, 437 U.S. at p. 16.)

As is clear, the high court found *Bullington* distinguishable from prior cases because of the nature of the sentencing proceeding involved. Unlike past cases, the separate sentencing proceeding in *Bullington* bore “the hallmarks of the trial on guilt or innocence” (451 U.S. at p. 439), including the right to a jury, notice to the defendant of the facts to be proved, the submission of evidence and presentation of argument, a sentencing choice between two alternatives, circumscribed discretion with standards to guide such discretion, and a requirement of jury unanimity and of proof beyond a reasonable doubt.

The Supreme Court followed *Bullington* three years later in *Arizona v. Rumsey* (1984) 467 U.S. 203 (hereafter *Rumsey*). In *Rumsey*, the defendant was convicted of armed robbery and first degree murder. The trial judge, without a jury, found no aggravating circumstances present and thus determined the appropriate sentence under state law was life imprisonment without the possibility of parole for 25 years. On appeal, the Arizona Supreme Court found the trial judge had been mistaken in concluding no aggravating circumstance existed and remanded for a new sentencing hearing. Following the new hearing, the trial judge sentenced the defendant to the death penalty. On appeal once again, the defendant in *Rumsey* claimed imposition of the death sentence on retrial violated the federal double jeopardy clause as interpreted in *Bullington, supra*, 451 U.S. 430. The state supreme court agreed and reduced the sentence to life imprisonment.

The United States Supreme Court granted Arizona’s petition for a writ of certiorari and affirmed. The high court explained that “[t]he capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding *that make it resemble a trial* for purposes of the Double Jeopardy Clause. The sentencer — the trial judge in Arizona — is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision *guided by detailed statutory standards* defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance and no mitigating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves *the submission of evidence and the presentation of argument*. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the

State must prove the existence of aggravating circumstances beyond a reasonable doubt. [Citations.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri. [Citation.]” (*Rumsey, supra*, 467 U.S. at pp. 209-210, italics added.)

The court in *Rumsey* thus underscored *Bullington*’s core holding that the federal double jeopardy clause will apply to sentencing proceedings when such proceedings bear “the hallmarks of the trial on guilt or innocence” (*Bullington, supra*, 451 U.S. at p. 439). Stated differently, we must ask whether the sentencing proceeding involves characteristics “that make it resemble a trial for purposes of the Double Jeopardy Clause.” (*Rumsey, supra*, 467 U.S. at pp. 209-210.) Despite the high court’s analysis in both *Bullington* and *Rumsey*, the majority declines to follow the teaching of those cases. As I explain, the majority’s approach is analytically insupportable.

#### B. Attempts at Distinguishing *Bullington* are Unpersuasive

The lead opinion acknowledges the existence of *Bullington, supra*, 451 U.S. 430, and its progeny, as well as that case’s “hallmarks of the trial on guilt or innocence” analysis. (See lead opn., *ante*, p. 10.) The opinion declines to apply that analysis because it finds this case is distinguishable from *Bullington* and, accordingly, “*Bullington*’s . . . analysis does not apply here.” (Lead opn., *ante*, p. 10.) First, the lead opinion contends the Supreme Court has suggested it would not apply *Bullington* to noncapital sentencing hearings. (Lead opn., *ante*, p. 10.) Second, aside from any perceived direction from the Supreme Court, the lead opinion finds it significant that “many of the procedural protections that apply in a [Penal Code] section 1025 trial rest on statutory, not federal constitutional, grounds.” (Lead opn., *ante*, p. 11.) Additionally, the lead opinion finds the procedures applicable to capital cases “find no parallel” in noncapital cases (*ibid.*);

the degree of mental anguish faced by a criminal defendant subject to multiple prosecutions of enhancement provisions is insufficient to warrant double jeopardy protection (*id.*, p. 12); and capital sentencing proceedings are distinguishable because they rely on proof of facts linked to the facts of the substantive crimes (*id.*, pp. 13-14; see also conc. opn. of Brown, J., *ante*, p. 3).

As I explain, any suggestions from the high court in post-*Bullington* cases are, at most, ambiguous. Nothing in *Bullington* itself suggests its analysis is limited to capital cases; more importantly, no Supreme Court case has ever held *Bullington* and its progeny are so limited. In addition, the distinction drawn by the lead opinion between statutory and constitutional protections is wholly unsupported; indeed, *Bullington* itself involved statutory procedural protections not mandated by the federal Constitution. Finally, the lead opinion’s attempt to distinguish *Bullington* and this case on their respective facts is wholly unpersuasive.

#### 1. The Supreme Court has Never Held *Bullington* is Limited to Capital Cases

The lead opinion asserts “the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases.” (Lead opn., *ante*, p. 10, italics added; but see conc. opn. of Brown, J., *ante*, p. 2 [noting “this question remains unresolved”].) Any such “suggestion,” of course, would not bind this court, which has an independent constitutional obligation to adjudicate the constitutional rights of litigants before it. Moreover, the two cases the lead opinion cites as making this “suggestion,” *Caspari, supra*, 510 U.S. 383, and *Pennsylvania v. Goldhammer* (1985) 474 U.S. 28 (per curiam) (hereafter *Goldhammer*), are readily distinguishable.

In *Caspari, supra*, 510 U.S. 383, the high court confronted an Eighth Circuit Court of Appeals decision applying the *Bullington* analysis, in the context



of a Missouri state prisoner's habeas corpus petition, to conclude prior felony convictions under Missouri's persistent offender statutes were subject to federal double jeopardy protections; thus, a state appellate court's reversal of the finding the petitioner was a persistent offender, due to insufficient evidence of the charged priors, barred retrial of the enhancement. (*Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109.) The high court did not directly address the merits of this holding; instead, the court discussed whether the Eighth Circuit's decision applying double jeopardy protection to sentencing in a noncapital case was a new rule of law requiring prospective application only. (*Teague v. Lane, supra*, 489 U.S. 288.) It was in this context the Supreme Court noted that "Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari, supra*, at p. 392 [127 L.Ed.2d at p. 247].)

The *Caspari* court did not "hold" *Bullington* was limited to capital cases. Rather, it made the observation noted above merely to support its conclusion that "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari, supra*, 510 U.S. at p. 393 [127 L.Ed.2d at p. 248].) Noting that federal and state courts had "reached conflicting holdings on the issue" (*id.*, at p. 395 [127 L.Ed.2d at p. 249]), the court concluded "that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree' " (*ibid.*); accordingly, under *Teague v. Lane*, the Eighth Circuit erred in applying its ruling retroactively to defendant's benefit. Significantly for our purposes, the Supreme Court concluded its opinion in *Caspari* by stating: "we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing, or whether Missouri's persistent offender scheme is

sufficiently trial-like to invoke double jeopardy protections." (*Caspari, supra*, at p. 397 [127 L.Ed.2d at p. 250], italics added.) As is clear, therefore, *Caspari* did not "hold" *Bullington* was limited to capital cases; more to the point, neither did the high court "suggest" it would so hold in the future. The court held only that it had not previously found *Bullington* applicable to noncapital cases, and so the Eighth Circuit's decision to do so for the first time in the context of a final conviction challenged by way of a petition for federal habeas corpus was improper.

*Goldhammer, supra*, 474 U.S. 28, presents similarly unimpressive evidence of a "suggestion" the high court would limit *Bullington* to capital cases. In that case, a per curiam opinion decided on summary disposition, the issue was whether, following a successful appeal by a defendant as to 34 of 112 counts of theft and forgery, the state was entitled to a remand for resentencing on other counts for which sentencing had been suspended. In other words, the case did not concern sentence enhancement proceedings, capital or otherwise. In a passage quoting *DiFrancesco, supra*, 449 U.S. at page 134, *Goldhammer* noted: "the decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.'" (*Goldhammer, supra*, 474 U.S. at p. 30, italics added, brackets in original.)

It would be a mistake to draw any significant inferences from the bracketed phrase. *DiFrancesco* was decided one year before *Bullington* and, at that time, the general rule was indeed that the high court's "decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." (*DiFrancesco, supra*, at p. 134.) The Supreme Court in *Goldhammer* no doubt simply added the bracketed phrase to adjust the quotation to take into account the holding of *Bullington*. At the time *Goldhammer* was decided (1985), as now, the only two cases in which the high court has found

a sentencing proceeding subject to the double jeopardy clause have been capital cases. (*Bullington*, *supra*, 451 U.S. 430; *Rumsey*, *supra*, 467 U.S. 203.) As we have explained, however, those cases did not turn on the fact the death penalty was involved.

*Caspari*, *supra*, 510 U.S. 383, and *Goldhammer*, *supra*, 474 U.S. 28, thus provide weak evidence at best for discerning whether the Supreme Court would apply *Bullington*'s analysis to a noncapital case. Moreover, if we are attempting to predict what the high court would hold (as opposed to what it has held), we must also consider *Lockhart v. Nelson*, *supra*, 488 U.S. 33, a case involving a hearing to determine noncapital sentence enhancements based on prior felony convictions. The *Lockhart* court "assume[d], without deciding," the double jeopardy clause applied to such proceedings. (*Id.*, at p. 37, fn. 6.) If the Supreme Court was of the opinion that *Bullington* was limited to capital proceedings, here was an opportunity to say so. If the court felt the double jeopardy clause was wholly inapplicable to sentencing proceedings not involving the death penalty, no reason appears to have decided *Lockhart* at all.

In any event, even assuming for argument *Caspari* and *Goldhammer* contain a "suggest[ion]" (lead opn., *ante*, p. 10) that the Supreme Court would not now apply the federal double jeopardy clause to noncapital sentencing proceedings, the simple fact is the high court has never actually "held" *Bullington* and *Rumsey* are so limited. Until directed otherwise by a definitive ruling, we are not bound by perceived "suggestions" in Supreme Court case law. We must decide the case before us based on constitutional principles, not predictions of what another court — even a higher court — may do if faced with a justiciable controversy. The Supreme Court having never held *Bullington* and *Rumsey* to be limited to capital cases, I would follow what several courts from around the country have done (see, e.g., *Bohlen v. Caspari*, *supra*, 979 F.2d 109, 113, *revd.*

on other grounds in *Caspari*, *supra*, 510 U.S. 383; *Durosco v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *People v. Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514 (hereafter *Cooper*); *State v. Hennings* (Wn.2d 1983) 670 P.2d 256, 259-262 (hereafter *Hennings*) and apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to this noncapital case to determine whether the federal double jeopardy clause applies here.

## **2. It is Irrelevant that Defendant's Procedural Protections are Statutory Rather Than Constitutional**

The lead opinion next asserts it is "relevant" that "many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) It is true that many of a criminal defendant's procedural rights in a trial of sentence enhancement allegations find their origins in either a statute or a decision of this court, and not in the federal Constitution. For example, a trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon* (1994) 9 Cal.4th 69), and, whether or not the trial is bifurcated, the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancements must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c), 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court (Pen. Code, § 1025; see also Pen. Code, § 969½ [when prior conviction allegation is added to complaint after defendant has pleaded guilty, he must be arraigned on the allegations]). The People bear the burden of proving the sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable-doubt to "criminal actions"].)



Despite the nonconstitutional origins of these procedural protections, however, it is the lesson of *Bullington*, *supra*, 451 U.S. 430, that when a state erects a system in which sentence-enhancing facts are adjudicated in a hearing bearing "the hallmarks of the trial on guilt or innocence" (*id.*, at p. 439), the federal double jeopardy clause applies. Nothing in *Bullington* or its progeny suggests this analysis is dependent on whether the applicable procedural protections are constitutionally mandated. Indeed, in *Bullington* itself, the state of Missouri required procedural protections for its capital defendants that were not grounded in the federal Constitution. For example, Missouri law provided the jury must both designate in writing which aggravating factors it found true (Mo.Rev.Stat. § 565.012.4 (1978)) and apply a beyond a reasonable doubt standard to proof of those factors (*ibid.*; see *Bullington*, *supra*, 451 U.S. at p. 434). Neither procedural requirement is constitutionally mandated. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.) The lead opinion fails to account for this aspect of *Bullington*.

Accordingly, the lead opinion is simply wrong in claiming the constitutional nature of the protections involved is "relevant" (lead opn., *ante*, p. 11) to determining whether *Bullington*'s analysis should apply here. Whether or not the procedural protections offered by a state for the adjudication of sentence-enhancing facts are constitutionally mandated is simply not a relevant consideration to the question before us.

### 3. *Bullington* is Not Distinguishable from the Present Case

The lead opinion next asserts that, any perceived "suggestion" in post-*Bullington* decisions aside, *Bullington* is substantively different from the present case, because it involved the death penalty, and "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.) The lead opinion also finds *Bullington* distinguishable

due to "the unique nature . . . of capital sentencing proceedings as compared to prior conviction proceedings." (Lead opn., *ante*, p. 15.) The lead opinion fails, however, to identify any persuasive reasons, in law or logic, why *Bullington* can or should be limited to capital cases.

Death is indeed different, for the state's execution of a human being as a penal sanction is both final and irreversible, modern society's most serious criminal penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (opn. of Burger, C.J.) [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plur. opn. by Stevens, J.) [because of finality and severity of the death penalty, "it is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].) For purposes of double jeopardy and applying *Bullington*, however, simply labeling the death penalty as "unique" or "different" obscures the pertinent inquiry, namely, in what relevant way is the death penalty different for purposes of double jeopardy?<sup>2</sup>

Significantly, the *Bullington* court itself did not rely on the mere fact the death penalty was involved. Indeed, it declined to overrule *Stroud*, *supra*, 251 U.S. 15, a capital case in which a defendant, initially sentenced to life imprisonment, was sentenced to suffer the death penalty on retrial following a reversal and a new trial. The *Stroud* court found no double jeopardy prohibition against imposing the death penalty on retrial. Had *Bullington* held capital cases

<sup>2</sup> As Justice Oliver Wendell Holmes observed, frequent repetition of an idea does not necessarily add to its logical force. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (*Hyde v. United States* (1912) 225 U.S. 347, 391 (dis. opn. of Holmes, J.).)

per se were different, it should have overruled *Stroud*. Instead, *Bullington* distinguished *Stroud* as a case in which the penalty trial — unlike the one in *Bullington* — was not one “like the trial on the question of guilt or innocence.” (*Bullington, supra*, 451 U.S. at p. 446.) “In *Stroud*, no standards had been enacted to guide the jury’s discretion.” (*Bullington, supra*, 451 U.S. at p. 439.) As the Supreme Court of Washington recognized: “Although *Bullington* involved the death penalty sentencing provision, neither the reasoning nor the holding in that case depends upon the presence of the death penalty.” (*Hennings, supra*, 670 P.2d 256, 260.) Clearly the mere presence of the death penalty is not the key here.

Nor can we say the trial-like procedures that governed Missouri’s capital sentencing proceedings are different in any meaningful way from the procedures governing the bifurcated sentencing proceeding used to determine the truth of the prior felony conviction allegation here. In both types of proceedings, the defendant may obtain a separate hearing, must be notified of what the People plan to prove, and is entitled to a jury and to counsel. In both types of proceedings, the trier of fact is guided by established standards and must choose one of two alternative verdicts. In the Missouri proceeding, the choices are death or life imprisonment without parole for 50 years. In the hearing in this case, the jury must decide whether the alleged prior conviction is true or untrue. Like the Missouri capital presentence hearing, the People in the present case are required to prove the alleged sentence enhancement beyond a reasonable doubt. As *Bullington* stated, “[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment . . . .” (*Bullington, supra*, 451 U.S. at p. 438.) Stated differently, the hearing on the prior felony conviction allegations bore “the hallmarks of the trial on guilt or innocence.” (*Id.*, at p. 439.)

Accordingly, the trial-like procedures that govern Missouri’s capital sentencing hearing are nearly identical to those that apply to the bifurcated proceeding held in this case to determine defendant’s prior felony convictions. I thus cannot agree with the lead opinion’s contrary conclusion that Missouri’s capital procedures “find no parallel in noncapital cases.” (Lead opn., *ante*, p. 11.)

The lead opinion also reasons that whereas *Bullington* held the relative level of embarrassment and anxiety a capital defendant would feel in facing a penalty phase trial was sufficiently comparable to the mental anguish suffered by a criminal defendant in the substantive guilt phase of a criminal trial (*Bullington, supra*, 451 U.S. at p. 445), the same cannot be said for a defendant facing a noncapital sentencing hearing. (Lead opn., *ante*, p. 12.) From this assessment of the emotional content of the trial experience, the lead opinion concludes *Bullington* should not be extended to noncapital sentencing proceedings.

What is missing from this discussion is a persuasive rationale supporting the bald assertion that a criminal defendant’s “anxiety and insecurity” when facing a possible life sentence as a result of past crimes is not equivalent to that experienced by a defendant being tried for a substantive criminal offense. In this era of “Three-Strikes-and-You’re-Out,” the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial. Such prior convictions, if two or more are sustained, can lead to a *minimum* term in prison of twenty-five-years-to-life, with a maximum term consisting of the balance of the defendant’s natural life. (Pen. Code, §§ 667, subd. (e)(2)(A)(i)-(iii), 1170.12, subd. (c)(2)(A)(i)-(iii).) Even if, as in this case, only one qualifying prior felony conviction is alleged, sustaining the prior conviction allegation will require the sentence be doubled in length, essentially adding as much time in prison as defendant received for committing the substantive offense.



(Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The lead opinion's comparison of the mental anguish suffered by capital versus noncapital defendants is thus unconvincing.

Finally, the majority finds capital penalty trials are different in kind because the evidence presented in such hearings "usually overlaps or supplements the evidence offered at the guilt phase of the trial," whereas "in a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) Even if true, this proposed distinction finds no support in *Bullington* whatsoever. I note the majority fails to cite *Bullington* or, indeed, any authority, indicating this evidentiary factor has any relevance to a double jeopardy analysis.

Nor am I convinced the majority is correct as an empirical matter. Although "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding" is an aggravating circumstance in this state's death penalty scheme (see Pen. Code, § 190.3, factor (a)), and a defendant is entitled to argue lingering doubt as a mitigating circumstance (*People v. Sanchez* (1995) 12 Cal.4th 1, 77), penalty phase evidence is often untethered to the facts of the crime. Instead, such evidence frequently recounts the defendant's past violent criminal conduct and/or explains aspects of the defendant's upbringing or mental health history, evidence, in other words, that does not overlap with the evidence presented at the guilt phase of the trial.

Moreover, even in a bifurcated hearing on prior felony conviction allegations, the evidence must sometimes establish some aspect of the present crime over and above the minimum necessary to obtain a guilty verdict on the substantive offense. For example, to impose a five-year enhancement term for a prior felony conviction pursuant to Penal Code section 667, subdivision (a), the

People must not only prove the existence of a qualifying prior conviction, but must also prove *the present conviction* qualifies as a "serious felony" under section 1192.7, subdivision (c). (See *People v. Equarte* (1986) 42 Cal.3d 456 [for assault with a deadly weapon to qualify as "serious felony" eligible for enhancement, state must prove personal weapon use or personal infliction of bodily injury]; *People v. Thomas* (1986) 41 Cal.3d 837 [observing that for burglary to qualify as a "serious felony" eligible for enhancement, state must prove defendant personally used a gun or deadly weapon, or inflicted great bodily injury, or entered a residence].) In such a case, we cannot say "the factual determinations [at the separate hearing] are generally divorced from the facts of the present offense . . . ." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.)

In sum, the majority proffers no persuasive reason to support its assertion that *Bullington's* "hallmarks of the trial on guilt or innocence" test is limited to capital cases.

#### 4. The Lead Opinion's Other Arguments are Unpersuasive

The lead opinion announces other reasons for declining to apply the federal double jeopardy clause in this case, but none is persuasive. For example, the lead opinion asserts that "a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." (Lead opn., *ante*, p. 5.) Because California thus could choose to provide *very few* procedural protections for sentencing allegations, reasons the lead opinion, it could certainly choose to provide less than full protection. From this, the lead opinion concludes "a trial of sentencing allegations *arguably* need not provide double jeopardy protection." (*Id.*, at p. 6, *italics added*.)

This argument is beside the point. While it may be true our Legislature could choose to provide fewer procedural protections for sentence enhancements

(see *People v. Vera* (1997) 15 Cal.4th 269, 286 (dis. opn. of Werdegarr, J.)), it has not done so. If anything, legislative action has moved in the opposite direction, ensuring a high degree of procedural protection for defendants charged with sentence-enhancing allegations. (See, e.g., Pen. Code, §§ 667, subd. (c) [prior convictions under legislative Three Strikes law must be "pled and proved"], 1170.12, subd. (a) [same under initiative Three Strikes law], 667.5, subd. (d) [prior prison term enhancements "shall not be imposed unless they are charged and admitted or found true"], 1025 [right to jury for prior felony conviction enhancements], 1102 [rules of evidence apply to criminal "actions"]; see also Pen. Code, § 190.3 [in penalty phase of capital case, evidence of prior criminal activity shall not be admitted "for an offense for which the defendant was prosecuted and acquitted"].)

The lead opinion also suggests federal double jeopardy cannot apply here because the Fifth Amendment specifically refers to "the offense," and "[t]he [double jeopardy] clause makes no express reference to sentencing determinations." (Lead opn., *ante*, p. 7.) This argument is belied by *Bullington* itself, for the high court applied the federal double jeopardy clause to the Missouri capital sentencing trial although no "offense" was involved therein. Clearly any suggestion the federal double jeopardy clause is limited to criminal "offenses" is incorrect.

#### 5. Authority from the Federal Circuits and Other States

Citing several cases from the various federal circuits and other states, the majority admits these courts "are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) As the lead opinion concedes, several federal circuits and state courts have profitably applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find the federal double jeopardy clause

applicable to noncapital sentencing proceedings. For example, in *Briggs v. Proctor* (5th Cir. 1985) 764 F.2d 368 (hereafter *Briggs*), Texas indicted the defendant for burglary and alleged two prior felony convictions which, if proved, required he be sentenced to life in prison. After a jury found the defendant guilty of the charged burglary, the state dismissed the charged prior convictions, citing proof problems. The defendant sought a new trial and the state joined the motion. When it was granted, the state again indicted the defendant for burglary. This time, however, the state charged two different prior felony convictions to enhance the sentence. (*Id.*, at p. 369.) The prior felonies were found true and the defendant was sentenced to life imprisonment.

The Fifth Circuit Court of Appeals applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to reverse the district court's denial of relief on habeas corpus. "Like the death-sentencing procedure discussion in *Bullington v. Missouri*, 451 U.S. 430 (1981), the Texas scheme requires the state to prove at trial, beyond a reasonable doubt, the predicate facts, two prior convictions, necessary for the imposition of the harsher sentence. 'The two prior convictions must be alleged in the indictment, and upon review the allegations are treated the same as allegations of the elements of a substantive offense.' [Citation.] Therefore, if the state fails to introduce sufficient evidence of the defendant's status as an habitual offender at a first trial, the Double Jeopardy Clause prohibits the sentencing of the defendant as an habitual offender at a second trial." (*Briggs*, *supra*, 764 F.2d at p. 371.)

The Supreme Court of Washington reached the same conclusion in *Hennings*, *supra*, 670 P.2d 256. The defendant in *Hennings* was charged with robbery and with being an habitual criminal under Washington's habitual offender law. He ultimately pleaded guilty to robbery, but the trial court dismissed the habitual criminal charge, concluding the People failed to prove defendant's guilty



plea in the prior conviction matter was knowingly and voluntarily obtained, a statutory requirement under Washington law. (*Id.*, p. 257.)

The Washington high court held double jeopardy precluded the People from recharging and retrying the habitual criminal allegation. The court explained that, like the capital proceeding at issue in *Bullington*, *supra*, 451 U.S. 430, an habitual offender determination under Washington law takes place in a separate proceeding in which the state bears the burden of proof beyond a reasonable doubt. In addition, should the allegation be proved, the range of penalties is strictly circumscribed: if the sentence is not suspended, the habitual offender must be sentenced to life imprisonment; there is no other sentence. (*Hennings*, *supra*, 670 P.2d at p. 258.) The "similarities [between *Bullington* and the Washington habitual offender law] indicate that under *Bullington* double jeopardy principles should apply to Washington's habitual criminal proceedings." (*Hennings*, *supra*, 670 P.2d at p. 260.)

As illustrated by *Briggs*, *supra*, 764 F.2d 368, and *Hennings*, *supra*, 670 P.2d 256, the majority rule that has emerged from the federal circuit courts and state high courts is this: *Bullington*'s "hallmarks of the trial on guilt or innocence" test is the applicable standard to determine whether noncapital sentencing proceedings are subject to the federal double jeopardy clause. As in *Briggs* and *Hennings*, many courts have found double jeopardy applies to bar retrial of a noncapital sentencing allegation because the state law at issue bore the hallmarks of a trial on guilt. (In addition to *Briggs*, *supra*, 764 F.2d 368 [5th Circuit], and *Hennings*, *supra*, 670 P.2d 256 [Washington], see, e.g., *Bohlen v. Caspari*, *supra*, 979 F.2d at p. 113, *revd.* on other grounds in *Caspari*, *supra*, 510 U.S. 383 [8th Circuit, interpreting Missouri habitual offender law]; *Nelson v. Lockhart* (8th Cir. 1987) 828 F.2d 446, 447-448, *revd.* on other grounds, *Lockhart v. Nelson*, *supra*, 488 U.S. 33 [interpreting Arkansas habitual offender law]; *Durosko v. Lewis*,

*supra*, 882 F.2d at p. 359 [9th Circuit interpreting Arizona law]; *People v. Quintana*, *supra*, 634 P.2d at p. 419 [Colorado]; *Gooper*, *supra*, 631 S.W.2d at pp. 513-514 [Texas]; *Ex Parte Augusta* (Tex.Crim.App. 1982) 639 S.W.2d 481, 484 [following *Cooper*]; cf. *DeBussi v. State* (Miss. 1984) 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

Other courts have applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings to come to a contrary conclusion, i.e., that the sentencing law at issue did not bear sufficient similarity to a trial on the question of guilt. Accordingly, these courts have found double jeopardy did not prohibit a retrial under the particular statutory scheme at issue. For example, in *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451 (hereafter *Wilmer*), a challenge to a Pennsylvania drug trafficker sentence enhancement scheme, the appellate court applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find double jeopardy did not apply. Noting the state was permitted to appeal the sentence in the particular statutory sentencing scheme at issue, the *Wilmer* court concluded there would be no second "trial." More importantly, only a preponderance of the evidence test was applicable. "The lower standard of proof signifies a more lax procedure which in turn signifies that a hearing is not, in the *Bullington* calculus, trial-like." (*Wilmer*, *supra*, 30 F.3d at pp. 457-458.) Contrary to the suggestion of the majority that *Wilmer* held double jeopardy could not apply to noncapital sentencing because of the absence of the death penalty, the *Wilmer* court applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test and concluded the state sentencing scheme at issue there was insufficiently analogous to a trial on guilt.

*People v. Levin* (Ill. 1993) 623 N.E.2d 317, which dealt with the Illinois habitual offender statute, also applied the *Bullington* analysis to a noncapital case

before finding double jeopardy did not apply. "The legislature has fashioned the habitual-criminal sentencing proceeding to be less formalized than a trial. Indeed, the paucity of due process protections at sentencing supports the conclusion that the legislature has deemed the defendant's interests at this stage of the proceeding to warrant fewer of those protections than at trial. We conclude that the separate hearing procedure under our Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt." (623 N.E.2d at p. 325.) In other words, the separate hearing held pursuant to Illinois's habitual offender statute does not bear the hallmarks of a trial on guilt, so double jeopardy does not apply.

Other cases applying the *Bullington* "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings and finding such hallmarks absent include *Woodall v. United States* (8th Cir. 1995) 72 F.3d 77, 79-80 (interpreting federal Armed Career Criminal Act), *State v. Sowards* (Ariz. 1985) 709 P.2d 513, 515 (Arizona), *State v. Cobb* (Mo. 1994) 875 S.W.2d 533, 535, hereafter *Cobb* (Missouri),<sup>3</sup> *Fitzpatrick v. State* (Mont. 1981) 638 P.2d 1002, 1017

<sup>3</sup> Although the lead opinion cites this case in support, and admittedly some language in the *Cobb* opinion suggests the court found Missouri's noncapital persistent offender law distinguishable from the sentencing scheme in *Bullington* on the ground the Missouri law did not involve the death penalty, the Missouri Supreme Court also had this to say: "In the sentencing of a persistent offender, the trial court's discretion is essentially unfettered. The judge has a wide range of punishment from which to choose and is not inhibited by explicit standards imposed by statute. In addition, as in *DiFrancesco*, the choice presented the trial judge in sentencing persistent offenders is far broader than that faced by a jury in sentencing a defendant to death. For the same reasons that *Bullington* is distinguishable from *DiFrancesco*, *Pearce*, *Chaffin* and *Stroud*, *Bullington* is distinguishable from this case. Therefore, applying the rationale of *Bullington*, double jeopardy does not attach to Missouri's noncapital persistent offender sentencing." (*Cobb*, *supra*, 875 S.W.2d at p. 535.) It thus appears the *Cobb* court

(footnote continued on next page)

(Montana), and *People v. Sailor* (1985) 491 N.Y.S.2d 112 (New York). (See also, *State v. Avila* (Ariz. 1985) 710 P.2d 440, 445-446 [quoting *Sowards* with approval]; cf. *State v. Ledbetter* (Conn. 1997) 692 A.2d 713, 717-718 [suggesting *Bullington* applies to state's noncapital persistent offender law, but concluding defendant waived the claim].) All of these cases recognize the applicable test in determining whether double jeopardy applies to bar retrial is whether the noncapital sentencing scheme bears sufficient similarity to a trial on guilt so that one can conclude, as in *Bullington*, that a not true finding operates as an "acquittal" of the sentencing allegation. (See, e.g., *Woodall v. United States*, *supra*, 72 F.3d at p. 79 [emphasizing government's burden of proof is only by a preponderance of evidence to conclude double jeopardy does not apply].)

The majority's attempt (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3) to distinguish these cases wholesale as insufficiently impressed with the "unique nature and constitutional origins" of the death penalty is flawed, relying as it does on an unjustified embellishment of the Supreme Court's rationale in *Bullington*. Although *Bullington* involved a capital sentencing scheme, the mere possibility of the death penalty was not cited by the *Bullington* court as central to its rationale. As noted above, the Supreme Court of Washington has explicitly rejected the notion that *Bullington* was premised on the fact the death penalty was there involved. (See *Hennings*, *supra*, 670 P.2d at p. 260; see also *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376-377 (conc. opn. of Anderson, J.) [fact death penalty was involved in *Bullington* was "not relied on nor even articulated

(footnote continued from previous page)

applied the *Bullington* analysis to conclude Missouri's persistent offender law did not bear the hallmarks of a trial on guilt or innocence.



by the Supreme Court as a basis for its holding"].) To the extent the majority relies on this "death-penalty-only" view of *Bullington*, it relies on an augmentation of that decision's rationale that appears nowhere in the body of the opinion itself.

The majority relies on cases which, admittedly, find *Bullington* does not apply to noncapital sentencing proceedings. In addition to espousing the minority rule, however, many of these cases employ faulty reasoning or announce their interpretation of *Bullington* in dicta. For example, in *State v. Aragon* (N.M. 1993) 861 P.2d 948, cited by the lead opinion in support (lead opn., ante, p. 15), the New Mexico Supreme Court found that double jeopardy did not attach to New Mexico's habitual offender proceedings because the law does not create a substantive criminal offense. (See *id.*, pp. 950-951 ["we have determined that habitual offender proceedings do not involve a determination of guilt of *any offense*" (italics added)], 953 ["double jeopardy does not attach to the habitual offender proceeding . . . because . . . there was no prosecution of *an offense*" (italics added)].) This reasoning misreads *Bullington*, for, as explained, ante, the jury in the Missouri capital sentencing trial in *Bullington* also did not try a separate "offense." Instead, the *Bullington* jury was deciding between life or death as an appropriate sentence. Clearly, whether or not a sentencing scheme delineates an "offense" is not the test. Accordingly, *Aragon's* reasoning is flawed.

*Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144 (hereafter *Denton*), also cited by the majority in support (lead opn., ante, p. 15; conc. opn. of Brown, J., ante, p. 3), contains the same analytical flaw (873 F.2d at p. 147 [Indiana's habitual offender statute "*does not create a separate offense . . .*"], italics added), but is unpersuasive for a more basic reason. In *Denton*, the defendant was convicted of rape and was also found to be an habitual offender under Indiana law based on his conviction of four prior unrelated felonies. After his rape conviction, one of the four prior felony convictions was vacated by a different court. The state

moved to retry the habitual offender allegation with the remaining three prior felony allegations (only two were necessary), deleting the now-vacated conviction. In these circumstances, the court held retrial was permissible.

*Denton* thus does not present a situation in which the state, with all its resources, failed to present sufficient evidence to convict. Instead, the matter was one of trial error for which the federal double jeopardy clause is inapplicable. (*Burks, supra*, 437 U.S. at pp. 15-16.) As even the *Denton* court opined: "This clearly is a case of 'trial error,' and not of insufficiency of the evidence." (*Denton, supra*, 873 F.2d at p. 148.) Any discussion in *Denton* of the application of *Bullington* was thus dictum.

*Linam v. Griffin, supra*, 685 F.2d 369, also declares its interpretation of *Bullington* in dictum. In *Linam*, the Tenth Circuit Court of Appeals found a state appellate court's reversal of a noncapital sentence enhancement "meets the *Burks* Court's definition of trial error and is not a true finding of inadequacy of evidence." (*Id.*, at p. 373.) Because only trial error was present in *Linam*, no double jeopardy bar to retrial applied irrespective of that court's views on *Bullington*. (See generally, *Bohlen v. Caspari, supra*, 979 F.2d at p. 114 [concluding *Linam* and *Denton* are distinguishable as cases involving trial error and not insufficiency of evidence]; *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1276 (dis. opn. of Moore, J.) [finding *Denton's* and *Linam's* discussion of *Bullington* to be dictum].) The majority's reliance on dicta in *Denton, supra*, 873 F.2d 144, and *Linam, supra*, 685 F.2d 369, is thus misplaced.

The majority rule emerging from the federal circuit courts and the high courts from our sister states is this: the test to determine whether the federal double jeopardy clause applies to bar multiple retrials of noncapital sentencing determinations is *Bullington's* "hallmarks of the trial on guilt or innocence" test. The cases cited by the majority in support of its contrary position delineate a

minority rule, and are for the most part weakly reasoned or announce their interpretation of *Bullington* in dictum: Because I find the majority rule better reasoned and thus more persuasive, I would apply *Bullington*'s "hallmarks of the trial on guilt or innocence" test to the facts of this case.

### C. Applying *Bullington* to This Case

*Bullington* found the federal double jeopardy clause applied to Missouri's capital sentencing hearing because that hearing bore the "hallmarks of the trial on guilt or innocence." The high court found it significant that the defendant enjoyed the right to a separate hearing and to a jury and that the jury was not granted broad discretion to choose an appropriate punishment, but was instead required to choose between two alternates authorized by statute. Perhaps most importantly, the prosecution bore the burden of establishing necessary facts beyond a reasonable doubt. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Bullington*, *supra*, 451 U.S. at p. 438.)

These same "hallmarks of the trial on guilt or innocence" apply to a trial on a sentence enhancement allegation. In such a hearing, the People bear the burden of proving the sentence enhancement beyond a reasonable doubt (*People v. Tenner*, *supra*, 6 Cal.4th at p. 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable doubt to "criminal actions"]), and the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancement must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c); 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court. (Pen. Code, § 1025; see also Pen. Code, § 969½ [requiring defendant be arraigned on a prior conviction allegation added to complaint after defendant has pleaded guilty].) The jury is limited to two alternatives (finding the allegation true or untrue) and is not

authorized to choose among a wider array of sentencing choices. The trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon*, *supra*, 9 Cal.4th 69), but in any event, the defendant is entitled to a contested "trial" on the enhancement allegations, including the right to present evidence.

This "trial" on sentence enhancement allegations may be profitably contrasted with a "traditional" sentencing hearing, in which the People bear no burden of proof, the trial court can receive evidence from outside of court (such as a probation report), the trial court wields broad discretion to fashion a sentence appropriate to the defendant's crime, and, of course, a defendant has no right to a jury. As in *Bullington*, the "trial" on the sentence enhancement allegation is for all intents and purposes identical to the preceding trial on the question of the defendant's guilt or innocence of the substantive criminal charges. Under these circumstances, *Bullington* compels the conclusion the federal double jeopardy clause applies to this case to bar retrial of defendant's prior felony conviction sentence enhancement.

## II. DOUBLE JEOPARDY UNDER THE CALIFORNIA CONSTITUTION

### A. Relying on the California Constitution

Irrespective of whether the majority is correct regarding the nonapplicability of the federal double jeopardy clause to this case, I conclude retrial of the prior felony conviction allegation is prohibited by the state constitutional double jeopardy clause. (Cal. Const., art. I, § 15.) Our state counterpart to the federal double jeopardy clause first appeared in the California Constitution of 1849, article I, section 8, where the language tracked the federal guarantee. The provision was moved essentially unchanged to article I, section 13 in the California Constitution of 1879, and finally came to rest in article I, section



15, of the present California Constitution; it provides: "Persons may not twice be put in jeopardy for the same offense . . . ."

Article I, section 24 of the state charter, added by popular vote in 1974, is also relevant to our discussion; it provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." That section was amended by Proposition 115 to state the following qualification: "In criminal cases the rights of a defendant to . . . not be placed twice in jeopardy for the same offense . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This [state] Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . ." This latter provision was invalidated, however, in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (hereafter *Raven*), as an improper revision of the state Constitution.

In light of the holding in *Raven* we remain free to continue our long-standing and constitutionally authorized practice, in appropriate situations, of interpreting our state Constitution to grant greater protection to state residents than would be afforded by the high court under the federal Constitution. It is true, as the lead opinion notes, that we have previously explained there must be "cogent reasons . . . before a state court construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (*Raven, supra*, 52 Cal.3d at p. 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.) This admonishment finds no application here, however, for, as explained, *ante*, the Supreme Court has never ruled on the question whether the federal double jeopardy clause applies to noncapital sentence enhancements. There is thus no federal construction from which to depart.

Significantly, we most recently faced this federal versus state Constitution question in a case specifically posing a double jeopardy question; there, we reaffirmed that "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than the federal Constitution." (*People v. Fields* (1996) 13 Cal.4th 289, 298.)

Indeed, good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies here. It is hornbook law that at the time the Bill of Rights was ratified in 1791, and until the 1920's, the Bill of Rights was not understood to apply against the states at all. (*Barron v. Baltimore* (1833) 32 U.S. (7 Pet.) 243.) Due to the selective nature of the incorporation doctrine, which arose in this century (see generally, Nowak & Rotunda, *Constitutional Law* (5th ed. 1995) § 10.2, pp. 339-342), application to the states of the various portions of the Bill of Rights was addressed judicially in a sequential manner. The federal constitutional guarantee not to be placed twice in jeopardy was not held applicable to state prosecutions until 1969. (*Benton v. Maryland, supra*, 395 U.S. 784.) Until that year, we had always relied solely on our own state Constitution to protect our residents from being placed twice in jeopardy.

Moreover, other than the rather obscure provisions in article II, section 10 of the federal Constitution (prohibitions of ex post facto laws, bills of attainder, interference with contracts), the Constitution placed no limitation on states in the area of personal liberties until ratification of the Fourteenth Amendment in 1868, almost two decades after California was granted statehood. From this bit of history, we can draw two conclusions. First, "[f]or most of the life of this nation the Federal Constitution offered no protection for the personal, religious, intellectual and political rights of its citizens in their relations with state and local government. In California those protections were provided by the Declaration of

Rights — Article I of the California constitution — which contains provisions much like those of the Federal Bill of Rights.” (Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More Than “Adequate” Nonfederal Ground* (1973) 61 Cal.L.Rev. 273, 274, capitalization in original [hereafter Falk article].) Second, and more important for our purposes, for the majority of this state’s political life, *it has been the state, not federal, Constitution that protected the personal liberties — specifically the right to not be placed twice in jeopardy — of Californians.*

If we go back even further in history, we find that state constitutional protections of individual liberties are not even derived from the Bill of Rights; rather, the reverse is true. “The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.” (Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv.L.Rev. 489, 501 [hereafter Brennan article].) When drafting the Declaration of Rights in our state Constitution, first in 1849 and again in 1879, “the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models.” (*Raven, supra*, 52 Cal.3d at p. 353.) There is thus good reason to look first to our state Constitution for guidance.

In interpreting the extent of various rights of personal liberty, this court has in the past eschewed the federal document and relied on the state Constitution in two distinct situations. First, we sometimes relied on our state Constitution to diverge from the high court’s interpretation of an analogous federal constitutional provision when we concluded the high court did not provide sufficient protection for individual liberties. For example, we held in *People v. Brisendine* (1975) 13

Cal.3d 528, 545-552, that a search incident to lawful arrest must be justified by a rule of reasonableness, contrary to the Supreme Court’s decision in *United States v. Robinson* (1973) 414 U.S. 260, which held a search incident to lawful arrest was per se reasonable.<sup>4</sup> (See cases collected at *Raven, supra*, 52 Cal.3d at p. 354; see generally, Grodin, Massey & Cunningham, *The California State Constitution* (1993) pp. 21-26 & accompanying notes; Falk article, 61 Cal.L.Rev. at pp. 277-280 & accompanying notes.)

Although we invalidated in *Raven* that portion of Proposition 115 tying state constitutional interpretation to the federal Constitution, we nonetheless remain cognizant the electorate expressed displeasure with state constitutional interpretations that granted criminal defendants greater procedural rights than are required under the federal Constitution. Accordingly, although we remain free, in light of *Raven*, to continue to interpret the state Constitution more expansively than its federal counterpart, we have declared there must be “cogent reasons” to do so. (*Raven, supra*, 52 Cal.3d at p. 353.) Here, however, we are not presented with such a situation because, as explained *ante*, the United States Supreme Court has never ruled on the precise issue before us.

We are, rather, presented with the second type of situation in which we historically have interpreted the state Constitution to provide protection of individual liberties, namely, *when no United States Supreme Court authority had yet emerged*. For example, in an opinion by Justice Mosk, we held the California Constitution guaranteed the right to counsel for persons charged with

<sup>4</sup> Of course, *Brisendine* and other state-law-based search-and-seizure cases were superseded by the enactment of Proposition 8. (See Cal. Const, art. I, § 28(d) [right to truth-in-evidence provision]; *In re Lance W.* (1985) 37 Cal.3d 873 [upholding same].)



misdemeanors. (*In re Johnson* (1965) 62 Cal.2d 325, 329.) At the time, no federal constitutional rule had yet emerged. Seven years later, the Supreme Court found a federal constitutional right to counsel in misdemeanor cases, at least where imprisonment was a possibility. (*Argersinger v. Hamlin* (1972) 407 U.S. 25.)

In the absence of federal constitutional authority binding us, we clearly are free to look to our state Constitution. Indeed, reliance on the state Constitution is preferable here, for not only has the United States Supreme Court never specifically ruled on the applicability of the federal double jeopardy clause to noncapital sentencing proceedings or sentence enhancements, it has had several opportunities to address the issue and has declined each time. (*Caspari, supra*, 510 U.S. 383, *Lockhart v. Nelson, supra*, 488 U.S. 33; *Hunt v. New York, supra*, 502 U.S. 964 (opn. of White, J., dis. from den. of cert.); see also *Carpenter v. Chappleau, supra*, 72 F.2d 1269, cert. den. \_\_\_ U.S. \_\_\_; 136 L.Ed.2d 61 (1996); *Wilmer, supra*, 30 F.3d 451, cert. den. 513 U.S. 970 (1994); *Denton, supra*, 873 F.2d 144, cert. den. 493 U.S. 941 (1989); *Durosco v. Lewis, supra*, 882 F.2d 357, cert. den. 495 U.S. 907 (1990); *Linam v. Griffin, supra*, 685 U.S. 369, cert. den. 459 U.S. 1211 (1983); *People v. Levin, supra*, 623 N.E.2d 317, cert. den. sub nom. *Levin v. Illinois*, 513 U.S. 826 (1994); *People v. Sailor, supra*, 491 N.Y.S.2d 112, cert. den. sub nom. *Sailor v. New York*, 474 U.S. 982 (1985).) Not only, therefore, are we left with no definitive holding from the high court, we cannot anticipate that court will soon resolve the question. This uncertain state of affairs provides "cogent reasons" (*Raven, supra*, 52 Cal.3d at p. 353), were they needed, for us to rely on our state Constitution. (See *Ex Parte Augusta, supra*, 639 S.W.2d at p. 485 [applying double jeopardy under Texas Constitution to noncapital sentencing proceeding]; *DeBussi v. State, supra*, 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

## B. Double Jeopardy under the State Constitution

When double jeopardy principles are involved, history shows we have not felt compelled to walk in the footprints left by United States Supreme Court precedent. For example, in *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, we held double jeopardy would preclude retrial following a mistrial granted over the defendant's objection. Although a retrial would have been allowed under the federal Constitution (*Gori v. United States* (1961) 367 U.S. 364), we simply stated: "[the federal] holding [in *Gori*] does not accord with the uniform construction placed by the court upon the jeopardy provision of the California Constitution. . . ." (*Cardenas, supra*, at p. 276.) We explicitly reaffirmed *Cardenas* in *Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-716.

*People v. Henderson* (1963) 60 Cal.2d 482 (hereafter *Henderson*), is similar. In *Henderson*, the defendant was convicted, on his plea of guilty, of first degree murder and sentenced to life imprisonment. On appeal, the court reversed for trial court error in permitting the defendant to withdraw his original plea of not guilty. On remand, the defendant was again convicted; this time, he was sentenced to suffer the death penalty. On appeal in this court, the defendant argued imposition of the death penalty on retrial violated his right against double jeopardy as set forth in article I, then-section 13 of the state Constitution.

This court agreed. Noting that in *Stroud, supra*, 251 U.S. 15, the Supreme Court held the federal double jeopardy clause did not prohibit imposition of the death penalty after a retrial for a defendant originally sentenced to life imprisonment, this court found the state Constitution marked out a different path: "A defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing

appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Henderson, supra*, 60 Cal.2d at p. 497.)

The Supreme Court followed *Stroud* with *North Carolina v. Pearce, supra*, 395 U.S. 711, a 1969 noncapital case, holding a greater sentence after a retrial does not violate the federal due process clause. We again followed our own path, applying to noncapital cases the state constitutional double jeopardy rule set forth in *Henderson, supra*, 60 Cal.2d 482. (*People v. Hood* (1969) 1 Cal.3d 444, 459 [following *Henderson* but not mentioning *Pearce*].) As one Court of Appeal observed: "[a]lthough presented with . . . the opportunity to [overrule *Henderson*] . . . , the court has never retreated from the rationale or holding of *Henderson*." (*People v. Superior Court (Harris)* (1990) 217 Cal.App.3d 1332, 1337, citing inter alia, *People v. Collins* (1978) 21 Cal.3d 208, 216-217; *People v. White* (1976) 16 Cal.3d 791, 802; *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *Curry v. Superior Court, supra*, 2 Cal.3d at pp. 716-717; *People v. Hood, supra*, 1 Cal.3d at p. 459.)

In *People v. Comingore* (1977) 20 Cal.3d 142, the defendant, who had stolen a car in California and driven it to Oregon, was convicted in Oregon of unauthorized use of a vehicle. Upon his release, he was prosecuted in California for grand theft auto based on essentially the same acts that gave rise to the Oregon conviction. Although the California prosecution would have been permissible under the high court's interpretation of the Fifth Amendment double jeopardy clause (see *Abbate v. United States* (1959) 359 U.S. 187), we held Penal Code section 793, a statute implementing double jeopardy principles, prohibited the California trial as it was predicated on the same facts that formed the basis of the Oregon trial. We did not expressly mention the state Constitution, but merely stated the rule in *Abbate* "does not preclude a state from providing greater double

jeopardy protection than is provided by the federal Constitution . . . ." (*Comingore, supra*, 20 Cal.3d at p. 145.) Although *Comingore* is not unequivocally a state constitutional (as opposed to state statutory) case, the principles at work seem congruent, especially because Penal Code section 793 merely implements the state constitutional double jeopardy guarantee.

In light of this court's strong history of relying on the state Constitution as a document of independent force in the double jeopardy area, I would rely on that document to resolve this case.

### *C. Applicability of State Double Jeopardy Principles to Sentence Enhancement Allegations*

As the lead opinion concedes, we recently determined double jeopardy principles precluded retrial of a firearm use enhancement allegation, charged pursuant to Penal Code section 12022.5, where the defendant's jury had previously found the allegation not true. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, fn. 22 [hereafter *Marks*]; cf. *People v. Santamaria* (1994) 8 Cal.4th 903, 910 ["The parties agree(d) that the jury's 'not true' finding on the knife-use enhancement allegation precludes retrial of that allegation"].) Noting the jury had found the allegation the defendant personally used a firearm "not true," we held "[t]he jury's rejection constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks, supra*, 1 Cal.4th at p. 78, fn. 22.)

Because *Marks* is but a few years old and applied double jeopardy principles to a finding on a sentence enhancement, one might assume it provides relevant authority to decide this case. The lead opinion, however, posits two reasons why it believes *Marks* is irrelevant to the proper resolution of this case. First, the lead opinion opines that *Marks* relies on a line of cases that are based on a state constitutional rule of double jeopardy that precludes penalizing a defendant with a longer sentence following a successful appeal of his or her conviction.



(Lead opn., ante, pp. 18-19.)<sup>5</sup> Second, the lead opinion asserts that "because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate." (Lead opn., ante, p. 19.)

The lead opinion's attempt to cabin the rationale in *Marks* founders because it fails to account for the *Marks* decision's emphasis on the fact the jury in that case found the enhancement allegation "not true," and *Marks*'s characterization of this finding as an "acquittal." The concept of an acquittal clearly implicates the historic constitutional double jeopardy bar to retrial. Indeed, if the federal double jeopardy clause protects against anything, it "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce*, supra, 395 U.S. 711, 717, italics added, fn. omitted.) "[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy . . . ." (*Green v. United States*, supra, 355 U.S. at p. 188, italics added.) By emphasizing the jury found the enhancement allegation "not true" and characterizing the finding as an "acquittal," the *Marks* court was clearly invoking this "long-settled" constitutional doctrine.

Moreover, the *Henderson-Collins-Hood* line of cases (see fn. 5, ante) cited in *Marks*, does not prohibit any retrial at all, but merely limits the aggregate sentence to no more than was achieved in the first trial. Thus, in *Henderson*, supra, 60 Cal.2d 482, where the defendant was sentenced to life imprisonment following his first trial, we did not purport to prevent any retrial whatsoever; we merely held he could not be given the greater sentence of the death penalty

<sup>5</sup> Such cases include *People v. Collins*, supra, 21 Cal.3d 208, 216-217, *People v. Hood*, supra, 1 Cal.3d 444, 459, *Henderson*, supra, 60 Cal.2d 482, 496-497, *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, and *People v. Asbury* (1985) 173 Cal.App.3d 362, 366.

following retrial. Invoking the same rule in *People v. Hood*, supra, 1 Cal.3d 444, we permitted a retrial but limited the aggregate sentence to that achieved in the first trial. (*Id.*, p. 459.) If, as suggested by the lead opinion, *Marks* was based solely on the state constitutional right against imposition of a greater sentence on retrial following a successful appeal, the *Marks* opinion should have permitted a retrial. Instead, *Marks* concluded "[t]he jury's rejection [of the enhancement] constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks*, supra, 1 Cal.4th at p. 78, fn. 22, italics added.) The lead opinion's belated attempt to redefine the meaning of *Marks* is thus unpersuasive.

Moreover, the lead opinion's restrictive reading of the double jeopardy clause of the California Constitution fails to address the following authorities, which pose analogous sentence enhancements and conclude double jeopardy applies: *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1309 (double jeopardy precludes retrial of Pen. Code, § 667.7 habitual offender enhancement because it was reversed for insufficient evidence); *People v. Pettaway*, supra, 206 Cal.App.3d at p. 1332, reversed on other grounds sub nom., *Pettaway v. Plummer* (9th Cir. 1991) 943 F.2d 1041 (state constitutional double jeopardy provision prohibits retrial of Pen. Code, § 12022.5 [personal firearm use] and Pen. Code, § 12022.7 [personal infliction of great bodily injury] enhancements following jury verdict enhancements were "not true" as to murder charge); *People v. Jones* (1988) 203 Cal.App.3d 456, 460, disapproved on another point, *People v. Tenner*, supra, 6 Cal.4th at p. 566, fn. 2 (double jeopardy precludes retrial of Pen. Code, § 667.5 prior felony conviction enhancement); *People v. Raby* (1986) 179 Cal.App.3d 577, 591 (double jeopardy precludes retrial of prior felony enhancement); and *People v. Bonner* (1979) 97 Cal.App.3d 573, 575 (double jeopardy prohibits reprosecution of narcotics weight enhancement allegation following appellate reversal for insufficient evidence); see also *People v. Guillen*

(1994) 25 Cal.App.4th 756 (reaffirming *Bonner*, but finding mistrial on weight enhancement does not preclude retrial); *People v. Reynolds* (1989) 211 Cal.App.3d 382, 390 (double jeopardy does not prevent retrial of serious felony enhancement under Pen. Code, § 667 because it was reversed for trial error and not for insufficient evidence).

It bears repeating that "the double jeopardy clause is no mere 'technicality'; it is an integral part of 'the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial.' (*United States v. Jorn* [(1971)], *supra*, 400 U.S. [470] at p. 479 (plur. opn.)). Effectuating the spirit as well as the letter of its liberality, courts have 'disparaged "rigid, mechanical" rules in [its] interpretation . . . . [Citation.]' (*Serfass v. United States* [(1975)], *supra*, 420 U.S. [377] at p. 390.) In animating our own independent 'vital safeguard,' we have expressly refused to perpetuate 'spurious distinction[s]' at the risk of 'giving our constitutional prohibition against twice in jeopardy a "narrow, grudging application" unsupported by either logic or reason.' (*Gomez v. Superior Court* [(1958)], *supra*, 50 Cal.2d [640] at p. 649 . . . .)" (*Marks, supra*, 1 Cal.4th at p. 79.)

Perhaps a bit uncomfortable with its decision — understandably, since the specter of a defendant being retried innumerable times on the same allegations until the People finally succeed in proving them true is indeed disturbing — the lead opinion concludes by detailing a long list of what it is not deciding. It explains that although the People are not prohibited by double jeopardy principles from retrying the prior felony conviction enhancement, other limits might curtail the ability of the People on retrial to obtain a true finding. The lead opinion opines, for example, that on retrial the People cannot rely solely on the same evidence as initially presented, for even if the bedrock principle of double jeopardy does not apply to bar retrial, the more amorphous prudential principles of law of

the case will apply. The lead opinion, although it declines to elaborate, also suggests unspecified limitations might restrict such required additional evidence. Similarly, the lead opinion hints there may be due process limits in such a retrial. (Lead opn., *ante*, p. 21.) One can only guess what these intimations mean for future cases; what is clear is that for this defendant, on the facts of this particular case, retrial following acquittal is permitted.

Such legal contortions are unnecessary. Not only does this court have a long history of relying on the state constitutional double jeopardy clause rather than its federal counterpart, there is in this state an unbroken line of cases applying the double jeopardy principles to noncapital sentence enhancement allegations. The majority breaks from this history without persuasive reasons for doing so. Accordingly, I would find the Court of Appeal's decision that the People adduced insufficient evidence to prove the enhancement alleged pursuant to Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d), prohibits retrial of the same enhancement allegation pursuant to article I, section 15 of the California Constitution. The People having had one good chance to prove the truth of the prior conviction allegation, they should now be barred by the state constitutional double jeopardy clause from a second chance to prove the same charge.

#### CONCLUSION

The lead opinion twice mentions the ease with which the People can prove a prior felony conviction such that it may be used to increase an offender's sentence: "a prior conviction trial," we are told, "is simple and straightforward," and "the outcome is relatively predictable." (Lead opn., *ante*, p. 13.) And again, repeating itself, the lead opinion declaims: "trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable." (*Id.*, at p. 21.) I



agree. Under such circumstances, I see no reason to do violence to double jeopardy principles merely to permit the People multiple opportunities to prove the existence of such prior convictions. I dissent.

**WERDEGAR, J.**

**WE CONCUR:**

**MOSK, J.  
KENNARD, J.**

*See next page for addresses and telephone numbers for counsel who argued in Supreme Court.*

---

Unpublished Opinion XXX NP opn. filed 7/25/96 - 2d Dist., Div. 3  
Original Appeal  
Original Proceeding  
Review Granted  
Rehearing Granted

---

Opinion No. S055881  
Date Filed: August 27, 1997

---

Court: Superior  
County: Los Angeles  
Judge: Sam Cianchetti

---

**Attorneys for Appellant:**

David H. Pierce and Clifford Gardner, under appointments by the Supreme Court, for Defendant and Appellant.

---

**Attorneys for Respondent:**

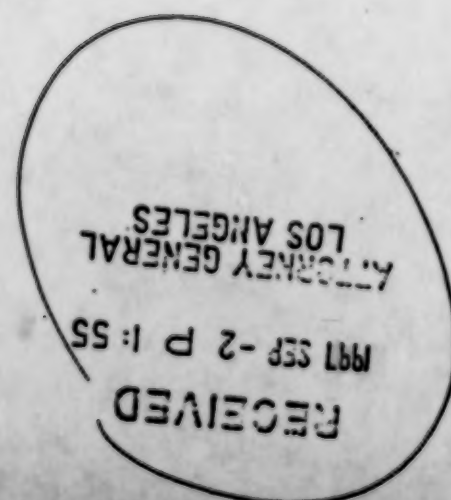
Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Susan D. Martynec, Pamela C. Hamanaka, Jaime L. Fuster and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Counsel who argued in Supreme Court (not intended for publication with opinion):

Clifford Gardner  
Gardner & Derham  
900 North Point, Suite 220  
San Francisco, CA 94109  
(415) 922-9404

Carl N. Henry  
Deputy Attorney General  
300 South Spring Street  
Los Angeles, CA 90013  
(213) 897-2273

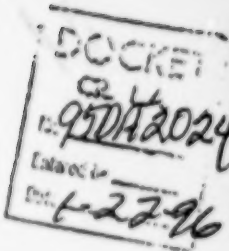
## APPENDIX B



*Rec'd  
9-4-97*



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION 3



PEOPLE OF THE STATE OF CALIFORNIA, )  
Plaintiff and Respondent )  
vs. )  
ANGEL J. MONGE, )  
Defendant and Appellant. )

2d Criminal  
No.: B094905  
Superior Court  
No.: KA025876

APPELLANT'S OPENING BRIEF

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

David H. Pierce  
CA Bar No. 150231  
P.O. Box 641192  
Los Angeles, CA 90064  
(310) 828-2041  
Attorney for Appellant

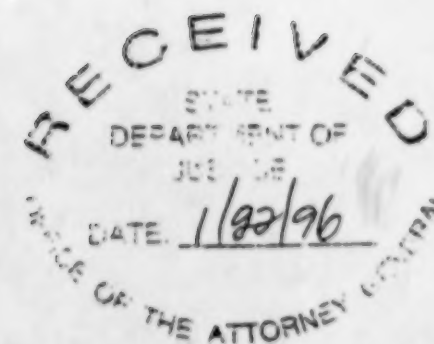


TABLE OF CONTENTS

Table of Authorities .....	iii
Statement of the Case .....	1
Statement of the Facts .....	3
Argument .....	5

THE TWO-STRIKES LAW DENIES APPELLANT'S  
RIGHTS TO DUE PROCESS, AS ITS  
CLASSIFICATIONS FAIL EVEN THE MOST  
MINIMAL RATIONAL RELATIONSHIP TEST.

Conclusion .....	15
Proof of Service .....	17

ARGUMENT

I

THE TWO-STRIKES LAW DENIES APPELLANT'S  
RIGHTS TO DUE PROCESS, AS ITS  
CLASSIFICATIONS FAIL EVEN THE MOST  
MINIMAL RATIONAL RELATIONSHIP TEST.

The Two-Strikes law singles out certain repeat offenders for extra punishment. Its arbitrary and irrational application serves as the basis of the law's constitutional infirmity. Unlike repeat offenders whose crimes are of increasing seriousness, Two-Strikes gives additional punitive enhancement to the person whose crimes are of decreasing seriousness. It simply makes no sense, nor has any jurisdiction recognized decreasing seriousness of offenses as a rational basis for increased punishment. This is an arbitrary and capricious law.

The Legislature has (perhaps unwittingly) classified two-time offenders, who have committed the exact same offenses, depending on the order in which the offenses are committed. A person who commits a non-serious felony, with a prior serious felony conviction, automatically receives the doubled sentence and reduced credits of the Two-Strikes law. Another person who commits the exact same crimes, but commits a serious felony with a prior non-serious felony, isn't subject to the Two-Strikes law at all, and gets no doubled sentence or reduced credits for either conviction.

Appellant recognizes that the threshold of rationality required for minimal due process review is itself quite



minimal. But it doesn't exist at all here. Carving out these particular repeat offenders for extra punitive enhancements makes no sense. For such offenders, the Two-Strikes law operates in a manner that not only lacks a nonarbitrary rational basis, but is the exact opposite of one. It is an unconstitutional law as adopted, and cannot be permitted to stand.

A. Constitutional Requirements

The principles of substantive due process of law protect a person against arbitrary legislative action depriving him of life, liberty or property, even if the person is afforded the fairest of procedural safeguards.

(Gray v. Whitmore (1971) 17 Cal.App.3d 1, 21.)<sup>3</sup>

Legislation that is arbitrary or otherwise lacks a real and substantial relation to the object sought to be obtained is prohibited under both federal and state Due Process Clauses. (Daniels v. Williams (1986) 474 U.S. 327, 331 [106 S.Ct. 662, 88 S.Ed.2d 662]; People v. Ramirez (1979) 25 Cal.3d 660, 663-664, 668; Goggin v. State Personnel Board (1984) 156 Cal.App.3d 96, 107.)

<sup>3</sup>"The federal and state Constitutions guarantee that no state shall deprive any person of life, liberty or property without due process of law. [Citation.]...Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. [Citation.] In substantive due process law, deprivation of a right is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation that is reasonably applied; that is, the law must have a reasonable and substantial relation to the object sought to be attained. [Citation.]" (In re Marilyn H. (1993) 5 Cal.4th 295, 306-307.)

Any given law's relation to a legitimate purpose must be substantial; if it only marginally serves legitimate interests, it cannot be upheld. (Griffin Development Co. v. Oxnard (1985) 39 Cal.3d 256, 272 [citing Moore v. City of East Cleveland (1977) 431 U.S. 494, 507 [97 S.Ct. 1932, 52 L.Ed.2d 531].])

It is inherent that a prison sentence directly affects a person's liberty. Accordingly, punishments which have the effect of increasing a person's prison sentence are subject to due process restrictions. (Wolff v. McDonnell (1974) 418 U.S. 539, 557 [94 S.Ct. 2963, 41 L.Ed.2d 935]; Morrissey v. Brewer (1972) 408 U.S. 471, 481-482 [92 S.Ct. 2593, 33 L.Ed.2d 484].)

B. Doubled Sentence

People who commit crimes of increasing seriousness are considered a greater danger than those who do not. The commission of crimes of increasing seriousness has long been recognized by our Judicial Council<sup>4</sup> as a factor in aggravation, warranting extra punishment. (California Rules of Court, Rule 421 (b)(2).) This rationally implements the directive that a sentencing scheme consider the degree of danger of the offender. (People v. Cheatham (1979) 23 Cal.3d 829; In re Rodriguez (1975) 14 Cal.3d 639, 654.)

<sup>4</sup>Other jurisdictions also recognize increasing seriousness of criminality as a sentence-aggravating factor. (See, e.g., Fla. Stat. section 921.001(8); RCW (Wash.) sections 13.40.020(12) and 13.40.160(1); State v. S.S. (1992) 67 Wash.App. 800, 817 [840 P.2d 891, 901]; State v. Hullaby (La. 1994) 641 So.2d 1094, 1097.)

The legislature has made no recognition that commission of crimes in decreasing order of seriousness warrant extra punishment, while crimes in increasing order of seriousness do not. Nor could there be such legislative recognition, if California Rules of Court, Rule 421(b)(2) has any rational basis at all.

It is inconceivable that any rational reason exists to justify why people whose convictions are in decreasing order of seriousness should receive more punishment than those people whose convictions are in increasing order of seriousness. Yet that is exactly what the Two-Strikes law does. It imposes an extra punitive enhancement of doubled sentences on people who have committed particular crimes in decreasing order of seriousness, which is never imposed on people who have committed the exact same crimes in increasing order of seriousness.

Prior to the enactment of the Two-Strikes law, Penal Code section 1192.7 characterized certain felonies as "Serious Felonies". As part of that requirement, two-time serious felony offenders were given enhanced sentences over all other two-time offenders who, either at present or in the past, committed "Non-Serious Felonies".<sup>5</sup> (Penal Code

---

<sup>5</sup>The serious felonies, needless to say, are more serious than the non-serious felonies. They "differ from other types of offenses in many ways, including the reasons and motives of the criminal, the outrage and harm to the victim, and the potential for danger to the victim and society in general." [Citation.] (People v. Jacobs (1984) 157 Cal.App.3d 797, 804.)

section 667, subdivision (a).) The enhancement for a two-time serious felony offender was an additional five-year sentence. By contrast, a two-time offender who committed a non-serious felony, past or present, could only get a one-year enhancement. (Penal Code section 667.5, subdivision (b).)

Only people who had committed two serious felonies would be eligible for five-year enhancements. People who committed one serious felony and one non-serious felony, in any order, were not. This statutory scheme of five-year enhancements for two-time serious felony offenders presented no constitutional problem, and the order of the offenses was irrelevant.

Now, that is no longer true. Instead, we have the following paradigm: crimes in increasing order of seriousness receive the normal range of prison terms. The second offense receives a normal range of prison terms, plus possibly a one-year enhancement for a prior prison term (if there is one).

Crimes in decreasing order of seriousness, however, are penalized more severely. The first offense receives the normal range of prison terms. The second offense receives double the normal range of prison terms, plus possibly a one-year enhancement for a prior prison term (if there is one).<sup>6</sup>

---

<sup>6</sup>The one-year enhancement is not doubled. (People v. Ramirez (1995) 33 Cal.App.4th



While the goal of the Legislature in its enactment of the Two-Strikes law may have been premised upon rational concerns (having repeat serious offenders on our streets), the current status is not the proper means to an end. It serves no purpose for a person whose crimes are in decreasing order of seriousness to receive a doubled sentence, while a person whose crimes are in increasing order of seriousness does not. This disparity is part of the statutory scheme on its face, and it doesn't make any sense.

People who commit the same crimes should be subject to the same sentences if there is no rational reason to make them subject to different ones. It would undoubtedly be rational to make the increasing serious offender subject to extra punishments that the decreasing seriousness offender would not receive. There is no rational reason to do it the other way around.

The rational basis test requires that a statutory classification must have a rational relationship to a legitimate state purpose. (Del Monte v. Wilson (1992) 1 Cal.4th 1009, 1014.) The classification must also have a fair and substantial relationship to the consequences that are made to flow from it. (Brown v. Merlo (1973) 8 Cal.3d 855, 861, 865.) There must be a "serious and genuine

---

559 [five-year enhancement must be imposed on top of doubling of sentence under Two-Strikes law, but is not itself doubled].)

judicial inquiry into the correspondence between the classification and the legislative goals." (Cooper v. Bray (1978) 21 Cal.3d 841, 848.) Any classification must be "founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." (Miller v. Union Bank & Trust Co. (1936) 7 Cal.2d 31, 34-35.)

In other words, there must be a rational basis for separating the class of persons who have committed exactly the same types of offenses - one serious felony, and one non-serious felony - into subclasses depending on the order in which they committed their offenses.

The legislative intent behind the Two-Strikes law, stated in the statute, is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Penal Code section 667, subdivision (b); People v. Brady (1995) 34 Cal.App.4th 65, 71.)<sup>7</sup>

- There is simply no rational relationship between this statute and the permissible legislative purpose of greater sentences for repeat offenders. True, this statute does give greater sentences for some repeat offenders. But

---

<sup>7</sup>As applied to singling out some two-time offenders for extra punishment, this means "The intent of the Legislature is to do what the statute does." A tautology is not a constitutionally acceptable reasonable relation between the statute and a permissible legislative purpose. (If it were, the rational relationship test would always be satisfied by every legislation, which is certainly not the case. See, e.g., Hale v. Morgan (1978) 22 Cal.3d 388, 397-403; Department of Mental Hygiene v. Hawley (1963) 59 Cal.2d 247, 256.)

shouldn't the rational relationship take into consideration all that it covers? Why these repeat offenders, and not others - especially when those certain others may very well pose a much greater danger to society?

Doesn't it matter if those who commit offenses in an increasing order of seriousness, present a greater harm (or at least an equivalent harm) than those who commit the same offenses in a decreasing order of seriousness? At the very least, there would be no rational basis for concluding that the increasing seriousness defendants present a lesser harm than the decreasing seriousness defendants. Then why are those who commit offenses in decreasing order of seriousness the only ones who get a doubled penalty?

The current status of the Two-Strikes law is inherently irrational, arbitrary, and unconstitutional. It makes as much sense as giving extra punishment to people who commit lesser crimes, or to people with lesser criminal histories - which is, no sense at all.<sup>8</sup>

The unconstitutionality appears in this case as well, since it appears in every Two-Strikes case involving a non-serious felony with a serious felony prior. Appellant received a doubled sentence for his non-serious felony

---

<sup>8</sup>It has also been recognized elsewhere that there are constitutional infirmities with imposing greater penalties on offenders whose acts are less serious. (See, e.g., People v. Suazo (Colo. Ct. App. 1993) 867 P.2d 161, 164 [statutory denial of defense to lesser-included offense which was granted to person charged with greater offense]; Roberts v. Collins (4th Cir. 1976) 544 F.2d 168, 169-70 [greater sentence for lesser-included offense than for greater offense]; Hobbs v. State (1969) 253 Ind. 195 [252 N.E.2d 498][same].)

conviction - using a minor to transport or sell marijuana - because he had a prior serious felony conviction. He would not have had the non-serious felony sentence doubled had he committed the non-serious felony first. Appellant received a doubled sentence for committing crimes in decreasing order of seriousness, whereas there would have been no doubling for crimes in increasing order of seriousness. There is no way to justify such a statutory scheme.

Because this classification fails even a minimal rational relationship test, it violates appellant's right to due process of law. Consequently, appellant's doubled sentence is constitutionally infirm and cannot be permitted to stand.

#### C. Sentence Credits

Sentence credits also directly affect the length of a person's prison sentence, and thus are just as amenable to due process as the original sentence itself. (Wolff v. McDonnell, supra.) Accordingly, the same constitutional infirmities that plague a doubling of the non-serious felony sentence under the Two-Strikes law also exist as to the sentencing credits provision.

The person whose crimes are in increasing order of seriousness is eligible for full one-for-one sentence credits. (Penal Code section 2933.) The person whose crimes are in decreasing order of seriousness, by contrast, get a maximum of one-for-four sentence credits. (Penal Code



sections 667, subdivision (c), subsection (5) and 1170.12, subdivision (a), subsection (5).)

Once again, this irrationally and arbitrarily singles out people whose offenses are in decreasing order of seriousness for extra punishment. This makes a bad unconstitutional situation worse, particularly since the more dangerous offenders (increasing seriousness) are not subject to the severely increased sentence (i.e., severely diminished credits).

At the very least, there is no rational relationship between making the two-time offenders with crimes of decreasing seriousness subject to an extra sentence (i.e., denial of sentencing credits) that increasing serious offenders never get, and any permissible legislative purpose.

As set forth in the previous argument, the provision relating to sentence credits similarly violates federal and state constitutional guarantees of due process of law. Appellant should therefore be entitled to one-for-one sentencing credits.

#### CONCLUSION

The will of our voters and our legislators is clear, but no matter how clear it is, it cannot trammel on the Constitution. The judicial system is the only mechanism available as a check and balance against that possibility, which is a reality in this case. One of the most important functions of the courts is to uphold the Constitution against inadvertent incursion by other branches of government.

Appellant respectfully asks this Court to perform exactly that function, because the challenged legislation is flatly unconstitutional. There are two ways this legislation could have been written to pass constitutional muster. One would have been to limit the Two-Strikes laws to repeat serious felons. There would have been no arbitrary extra punishment to only some offenders, and no classifications. The other option might have been to broaden the law, by making every person who had committed a single serious felony at any time eligible for Two-Strikes treatment, irrespective of the order of the offenses. The legislation does not say either of these things.

Moreover, this Court cannot rewrite the Two-Strikes law, and cannot narrow it in a manner that would eliminate the unconstitutionality of the classifications as they apply to appellant. It can only excise the unconstitutional doubling and reduced time credit provisions in his sentence.

For all these reasons, appellant respectfully asks this Court to vacate his sentence, and remand for resentencing without regard to the provisions of Penal Code section 667, subdivisions (c)(5) and (e)(1), and section 1170.12, subdivisions (a)(5) and (c)(1).

DATED: ;

Respectfully Submitted;

---

David H. Pierce  
Attorney for Appellant

Proof of Service

I declare that I am over the age of eighteen, a citizen of the United States, and not a party to this action. I served the attached

APPELLANT'S OPENING BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Office of the Attorney General (via hand delivery)  
300 S. Spring Street  
Los Angeles, California 90013

Angel J. Monge H-41271  
Pleasant Valley State Prison  
P.O. Box 8500  
Coalinga, California 93210

Elizabeth A. Courtenay, Esq.  
California Appellate Project  
611 Wilshire Boulevard, 2nd Floor  
Los Angeles, California 90017-2928

Clerk of the Superior Court  
Honorable Sam Cianchetti, Dept. EA "B"  
400 Civic Center Plaza  
Van Nuys, California 91401

Larry Larson, Esq.  
Office of the District Attorney  
400 Civic Center Plaza, 2nd Floor  
Pomona, California 91766

Antonio Jose Bestard, Esq.  
Office of the Public Defender  
315 West Mission Boulevard  
Pomona, California 91766-1606

I declare under penalty of perjury under the laws of the State of California that the above is true.

Executed this 22nd day of January, 1996, Los Angeles, California.

---

Declarant



# APPENDIX C

DANIEL P. POTTER  
Chief Deputy



OFFICE OF THE CLERK  
COURT OF APPEAL  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
JOSEPH A. LANE, CLERK

Second Floor, North Tower  
300 South Spring Street  
Los Angeles, California 90013  
Telephone: (213) 897-2307

June 7, 1996

David H. Pierce, Esq.  
P.O. Box 641192  
Los Angeles, CA 90064

Daniel E. Lungren, Attorney General  
George Williamson, Chief Asst. Atty. General  
Carol Wendelin Pollack, Senior Asst. Atty. General  
Jaime L. Fuster, Deputy Attorney General  
Carl N. Henry, Deputy Attorney General  
300 South Spring Street, Room 5212  
Los Angeles, CA 90013

Re: *The People v. Angel Jaime Monge*,  
2d Crim. No. B094905  
(Los Angeles Super. Ct. No. KA025876)

Dear Counsel:

The record in this case reflects the presence of an issue not discussed by the parties. Counsel are therefore requested to file supplemental letter briefs discussing the question of whether there was *sufficient evidence* to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied

David H. Pierce, Esq.  
Daniel E. Lungren, Attorney General  
Re: *The People v. Monge*  
June 7, 1996  
Page 2

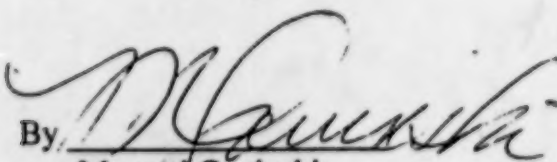
upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).

The parties may wish to consider *People v. Reed* (1996) 13 Cal.4th 217, 220-231; *People v. Guerrero* (1988) 44 Cal.3d 343, 355, 356, fn. 1; *People v. Piper* (1986) 42 Cal.3d 471, 475-478; *People v. Equarte* (1986) 42 Cal.3d 456, 459, 466; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People v. Goodner* (1992) 7 Cal.App.4th 1324, 1328-1333; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1349-1351; *People v. Williams* (1990) 222 Cal.App.3d 911, 914-918; and *People v. Smith* (1988) 206 Cal.App.3d 340, 345, fn. 8.

The requested letter briefs should be filed with this court and served on opposing counsel by no later than 5:00 p.m. on June 17, 1996.

Very truly yours,

JOSEPH A. LANE, Clerk

By   
Masumi Gavinski  
Deputy Clerk

jbc

DANIEL E. LUNGREN  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



300 SOUTH SPRING STREET, SUITE 5212  
LOS ANGELES, CA 90013  
(213) 897-2000

FACSIMILE: (213) 897-2263  
(213) 897-2273

June 17, 1996

Presiding Justice Joan Dempsey Klein  
and Associate Justices  
California Court of Appeal  
Second Appellate District, Division Three  
Second Floor, North Tower  
300 South Spring Street  
Los Angeles, California 90013

CLERK'S OFFICE  
COURT OF APPEAL - SECOND DIST  
RECEIVED  
JUN 17 1996

JOSEPH A. LANE Clerk

RE: *People v. Angel Jaime Monge*  
2d Crim. No. B094905; Our No. LA95DA2024

Dear Presiding Justice Klein and Associate Justices:

REMAND IS WARRANTED IN VIEW OF OUR SUPREME COURT'S VERY  
RECENT DECISION IN *PEOPLE V. REED* (1996) 13 CAL.4TH 217

On its own motion, this Court has ordered the parties to discuss "whether there was sufficient evidence to support the finding by the court [RT 238; CT 87] that appellant suffered a prior felony conviction pursuant to" the Three Strikes Law (Pen. Code, §§ 667, subds. (b) through (i) [legislative version], 1170.12, subds. (a) through (d) [voter's initiative]). (Letter from Deputy Clerk Masumi Gavinski to the parties dated June 7, 1996, original italics.) The information alleged appellant suffered a 1992 assault with a deadly weapon conviction within the meaning of the Three Strikes Law. (CT 16.) The abstract of judgment concerning the prior, which was admitted into evidence as an exhibit in the instant case, states appellant pled guilty to the crime "ADW GBI [Pen. Code, § 245, subd. (a)(1)," on July 2, 1992. (CT 85.) This Court's letter to the parties states:

"In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant personally inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or personally used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7,

1. All further statutory references are to the Penal Code unless otherwise indicated.



subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1) [the Three Strikes Law]." (Original Italics.)

With respect to the prosecution's burden to prove a defendant suffered a "serious felony" within the meaning of the felonies listed in section 1192.7, subdivision (c), our Supreme Court has held under the so-called "the Guerrero rule" [*People v. Guerrero* (1988) 44 Cal.3d 343]: "[T]he trier of fact may look to the entire record of conviction to determine the substance of the prior conviction." (*People v. Reed* (1996) 13 Cal.4th 217, 223, original italics (citing *People v. Guerrero*, supra, 44 Cal.3d at p. 355).) The *Reed* court stated: "In *Guerrero* we declined to address any question regarding 'what items in the record of conviction are admissible and for what purposes.'" (*People v. Reed*, supra, 13 Cal.4th at p. 223, footnote omitted (citing *People v. Guerrero*, supra, 44 Cal.3d at p. 356, fn. 1); *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350 [discusses and cites authority concerning this issue]; *People v. Williams* (1990) 222 Cal.App.3d 911, 916 [same].) *Reed* held excerpts from a preliminary hearing transcript are admissible under the former testimony exception (Evid. Code, § 1291) to the hearsay rule (Evid. Code, § 1200) to prove the substance of a prior conviction (*People v. Reed*, supra, 13 Cal.4th at pp. 220, 225-229),<sup>2</sup> but excerpts from a probation report are inadmissible hearsay and thus may not be used to prove the substance of a prior conviction (*People v. Reed*, supra, 13 Cal.4th at pp. 230-231).<sup>3</sup>

As to the 1992 assault conviction in Case No. KA013241, it would appear there is nothing in the record which proves appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision

2. The *Reed* court stated: "We conclude the [preliminary hearing] transcript was part of the record of the prior conviction" (*People v. Reed*, supra, 13 Cal.4th at 223), and stated: "The certified transcript, introduced to prove the events of the prior proceeding, was within the exception for official records (Evid. Code, § 1280; *People v. Abarca* [(1991)] 233 Cal.App.3d 1347, 1350); indeed, the transcript is, by statute, deemed prima facie evidence of the prior testimony. (Code Civ. Proc., § 273.)" (*People v. Reed*, supra, 13 Cal.4th at p. 225).

3. The *Reed* court declined to state whether the probation officer's report is "part of the record" of the prior conviction. (*People v. Reed*, supra, 13 Cal.4th at 230.)

(c)(23) of section 1192.7.<sup>4</sup> (See RT 189-193, 238; CT 85 [the abstract of judgment from the 1992 assault conviction], 87, 94 [excerpt from the probation report].) While it's true the abstract of judgment of the 1992 proceeding indicates appellant's "ADW GBI" conviction was obtained pursuant to a guilty plea (CT 85), the law is clear: Absent a valid admission that a prior conviction was a serious felony, proof of a prior conviction establishes only the minimum elements of the crime and the prosecution cannot go behind the record of the conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime. (*People v. Piper* (1986) 42 Cal.3d 471, 475, citation omitted.) The court in *People v. Equarte* (1986) 42 Cal.3d 456, stated: "[A]n assault-with-a-deadly-weapon conviction may constitute a 'serious felony' within the relevant statutes if the prosecution properly established that the defendant 'personally used a dangerous or deadly weapon' in the commission of the offense (§ 1192.7, subd. (c)(23))." (*Id.*, at p. 459.) "[S]imple assault with a deadly weapon is not

4. Respondent notes, however, appellant did not object to the following argument made by the prosecutor to the court: "In the prior case that the defendant pled guilty to, KA012341, it was alleged in count I that he committed a crime of assault with a deadly weapon, to wit, a stick upon the victim of Miss Garcia. And there was no other defendants in that case. And, in fact, the defendant pled guilty to it, in which case he personally used the deadly weapon, a stick upon the victim in the case, which would make it a serious felony according to 1192.7, also *People v. Arwood* [sic]." (RT 189-190.)

5. Appellant has waived any hearsay objection to the use of the probation report to prove he personally inflicted great bodily injury and/or used a dangerous or deadly weapon within the meaning of subdivision (c) of section 1192.7. This is so because "there is a general rule against considering points on appeal not raised in the trial court. [Citation.]" (*In re Andre P.* (1991) 226 Cal.App.3d 1164, 1169; see *Burden v. Snowden* (1992) 2 Cal.4th 556, 570; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 724-725 [defendant waived due process claim his sentence was improperly aggravated].) Indeed, the *Reed* court held as it did after noting: "Defendant unsuccessfully objected to both documents [the preliminary hearing transcript excerpts and the probation report excerpts] on grounds of hearsay and lack of foundation." (*People v. Reed*, supra, 13 Cal.3d at p. 221.) By contrast, appellant did not object in the trial court to the use of the probation report on hearsay grounds. Thus, he is precluded from raising that objection on appeal. (See Evid. Code, § 353.)



one of the offenses specifically named in section 1192.7, subdivision (c) [.] (Id., at p. 466.)<sup>6</sup>

Accordingly, in light of the fact our Supreme Court decided *People v. Reed*, supra, 13 Cal.4th 217, after briefing in the instant case, respondent submits this case should be remanded so that the People may properly prove beyond a reasonable doubt,<sup>7</sup> either through excerpts from the preliminary hearing transcripts (*People v. Reed*, supra, 13 Cal.4th at pp. 225-229) or through an admission by appellant which may be recorded in the probation report in Case No. KA013241 (*People v. Goodner*, supra, 7 Cal.App.4th at pp. 1328-1332; *People v. Garcia* (1989) 216 Cal.App.3d 233, 236-238; *People v. Williams*, supra, 222 Cal.App.3d at pp. 916-917),<sup>8</sup> that appellant personally inflicted great bodily injury within the meaning of subdivision (c) (8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c) (23) of section 1192.7 in Case No. KA013241 (see RT 189-190). (See *In re Moser* (1993) 6 Cal.4th 342, 345 ["Under these circumstances, we conclude that this matter should be remanded to the superior court to provide both parties the opportunity to present evidence relevant to these issues, and to enable the superior court to consider petitioner's

6. Compare *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1371-1373 ["No other evidence was offered. The evidence was sufficient to prove appellant was convicted of second degree burglary, a felony. It was utterly insufficient to prove that the burglary appellant was convicted of concerned 'an inhabited dwelling house' . . . "] to *People v. Goodner* (1992) 7 Cal.App.4th 1324, 1333 ["the probation report from 69112 contains defendant's admissions that he and his accomplice chose to burglarize a 'home' and that they were inside the 'residence' for about five minutes when defendant poured some vodka from a flask while his accomplice ransacked the home, from which they then stole money and jewelry"] ["Defendant's admissions of what he did in the house, what was inside the house, including the fact that there was an identifiable 'bedroom,' and what he and his accomplice took from the house, provided evidence from which a rational trier of fact could make an inference of residence"].

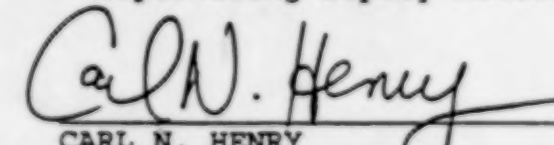
7. "[T]he state must prove the elements of a prior conviction enhancement true beyond a reasonable doubt." (*People v. Williams*, supra, 222 Cal.App.3d at p. 915)

8. See, e.g., *People v. Abarca*, supra, 233 Cal.App.3d at pp. 1349-1351 [reporter's transcript of Abarca's plea in his prior conviction properly used to prove that conviction was a "serious felony"]; *People v. Smith* (1988) 206 Cal.App.3d 340, 345 [guilty plea waiver form signed by defendant in which he acknowledged the facts underlying the prior conviction properly used to prove that conviction was a "serious felony"].

claim in light of the governing legal principles set forth in this opinion"]; *People v. Goodner*, supra, 7 Cal.App.4th at p. 1330 ["Upon remand in the case at bar, the probation report was admitted pursuant to our holding in *Goodner I*; the trial court allowed as admissions only defendant's statements regarding the nature of the prior offense while other hearsay in the report was excluded"]; but see *People v. Williams*, supra, 222 Cal.App.3d at p. 918 ["the proper remedy is to strike the enhancement"]; accord, *People v. Jackson*, supra, 7 Cal.App.4th at pp. 1373-1374.) There are no double jeopardy obstacles to remand in the instant case. (See *People v. Saunders* (1993) 5 Cal.4th 580, 596-597 ["We hold that, because determination of the truth of the alleged prior convictions was bifurcated from the trial of the current charges, the court's action in conducting further proceedings to determine the truth of those allegations, following discharge of the jury that returned the guilty verdict, did not violate the double jeopardy clause of either the United States Constitution or the California Constitution"]; *People v. Torres* (1996) 45 Cal.App.4th 640, 644 ["We also conclude the People are not barred by double jeopardy from proceeding on the [prior "strike"] allegations on remand"].)

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General  
of the State of California  
GEORGE WILLIAMSON, Chief, Assistant  
Attorney General  
CAROL WENDELIN POLLACK  
Senior Assistant Attorney General  
SUSAN D. MARTYNEC  
Supervising Deputy Attorney General  
PAMELA C. HAMANAKA  
Supervising Deputy Attorney General

  
CARL N. HENRY  
Deputy Attorney General  
State Bar No. 168047

Attorneys for Respondent



DECLARATION OF SERVICE BY MAIL

Re: Peo. v. Angel Jaime Monge No. B094905

I, the undersigned, certify and declare that I am a resident of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within cause; my business address is 300 So. Spring St., Los Angeles, California, 90013.

On June 17, 1996, I served a copy of:

LETTER DATED JUNE 17, 1996, TO HONORABLE JOAN DEMPSEY KLEIN,  
PRESIDING JUSTICE, AND ASSOCIATE JUSTICES, CALIFORNIA COURT OF  
APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE,  
300 SOUTH SPRING STREET, LOS ANGELES, CA 90013.

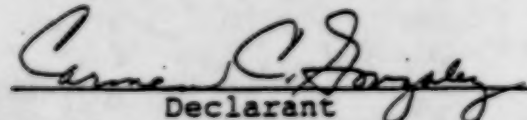
to the following, by placing same in an envelope addressed as follows:

David H. Pierce, Esq.  
P.O. Box 641192  
Los Angeles, CA 90064

Said envelope was then sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1996, at Los Angeles, California.

  
Declarant

CNH:ccg  
LA95DA2024

APPENDIX D

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
ANGEL JAIME MONGE,  
Defendant and Appellant.

B094905  
(Super. Ct. No. KA025876)  
(Sam Cianchetti, Judge)

COURT OF APPEAL - SECOND DIST.  
**FILED**  
JUL 25 1996  
JOSEPH A. LAINE Clerk  
Deputy Clerk

DOCKET  
95-04-2024  
7-26-96

THE COURT:\*

Angel Jaime Monge appeals from the judgment entered following his convictions by jury of use of a minor to sell or transport marijuana, sale or transportation of marijuana, and possession of marijuana for sale, with a court finding that he suffered a prior felony conviction and a prior felony conviction for which he served a separate prison term. (Health & Saf. Code, §§ 11359, 11360, subd. (a), 11361, subd. (a); Pen. Code, §§ 667, subd. (d), 667.5, subd. (b).) He was sentenced to prison for 11 years and

\*CROSKEY, Acting P.J., ALDRICH, J., and RECANA, J.\*\*

\*\* Judge of the Municipal Court sitting under assignment by the Chairperson of the Judicial Council.

contends: "The Two-Strikes Law denies appellant's rights to due process, as its classifications fail even the most minimal rational relationship test."

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on January 25, 1995, appellant sold or transported marijuana in Pomona, using a minor to do so, and, after the transaction, possessed other marijuana for sale. In defense, appellant presented evidence that the offenses were not committed.

DISCUSSION

There was insufficient evidence that appellant suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d) and 1170, subdivision (b)(1).

Appellant contends Penal Code section 667, subdivisions (b) through (i) denies appellant's rights to due process, as that section's classifications fail even the most minimal rational relationship test. However, there is no need to decide that issue.

We have requested, and received, supplemental briefing on the issue of whether there was sufficient evidence to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).<sup>1</sup> Appellant contends, in essence, that the evidence was insufficient. We conclude the contention is well-taken.

<sup>1</sup> In particular, we requested the parties to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).



The amended information alleged that appellant suffered a July 2, 1992, conviction for "ASSAULT WITH A DEADLY WEAPON in violation of [Penal Code] section 245(a)(1)" in case No. KA013241 pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).<sup>2</sup> At the court trial on the allegation, the court stated that "the only evidence to be considered by the court is the conviction which the court will take judicial notice of in case number [KA013241]." (*Italics added.*) The People proffered People's exhibit No. 1, a Penal Code section 969b prison packet dated February 17, 1995. That exhibit reflects appellant was previously convicted as indicated above for felonious assault. The exhibit characterized the crime as "245 (a)(1) . . . ADW GBI" and "ASLT W/DW (245(a)(1)PC)." <sup>3</sup> People's exhibit No. 1 was "received in evidence."<sup>4</sup> The court found true that appellant suffered "the prior felony . . . . The felony being personal use of a deadly weapon in violation section 245, 245(a)(1)." Appellant was sentenced to prison for 11 years, consisting of a 10-year middle term pursuant to Penal Code section 667, subdivision (e)(1) for using a minor, plus 1 year pursuant to Penal Code section 667.5, subdivision (b). He also received a concurrent two-year term for the possession of marijuana for sale conviction, and punishment on his conviction for the sale or transportation of marijuana was stayed pursuant to Penal Code section 654.<sup>5</sup>

---

<sup>2</sup> That prior conviction was also the basis for the Penal Code section 667.5, subdivision (b) enhancement.

<sup>3</sup> Appellant acknowledged the People had shown the exhibit to appellant before trial.

<sup>4</sup> The June 12, 1995, minute order pertaining to the court trial reflects, "People's exhibit 1-department of corrections document is received in evidence." No other court trial evidence is referred to in the minute order.

<sup>5</sup> At sentencing, the court stated that the issue of the prior conviction was submitted based upon the prison packet and "evidence contained in [the] court file . . . ."

Based on the above, the court's true finding that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), was based on insufficient evidence. A review of People's exhibit No. 1 reveals that, although it reflects the above indicated prior felonious assault conviction, the exhibit does not expressly state whether appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7 subdivision (c)(8), or whether he *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23). The omissions, insofar as People's exhibit No. 1 is concerned, are fatal. Nor does the fact that the court took judicial notice of the bare "conviction"<sup>6</sup> supply the requisite proof. (*People v. Piper* (1986) 42 Cal.3d 471, 475-478; see *People v. Equarte* (1986) 42 Cal.3d 456, 459, 466; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People v. Williams* (1990) 222 Cal.App.3d 911, 914-915.)<sup>7</sup>

---

<sup>6</sup> As mentioned, during the court trial the court stated, "the only evidence to be considered by the court is the conviction which the court will take judicial notice of in case number [KA013241]." Although the court referred here to "evidence," we view that reference as informal, and further view the court's statement only as a taking of "judicial notice" of the conviction. The only item that the People formally proffered as "evidence" was People's exhibit No. 1. This was the only item appellant acknowledged having been shown by the People before trial, and was the only item to which he objected. Moreover, People's exhibit No. 1 was the only item the court expressly stated had been received in "evidence," and was the only item referred to as "evidence" in the pertinent minute order.

<sup>7</sup> The court's sentencing comment that the prior conviction issue was submitted based in part upon "evidence contained in [the] court file" does not compel a contrary conclusion. First, the *comment* was post-trial and may not be relied upon; the People were required to *prove* the prior conviction allegation *at trial*. (*People v. Jackson, supra*, 7 Cal.App.4th at pp. 1370-1373.) Second, we view the above quoted comment as an informal reference to the fact that, at the court trial, the court took judicial notice of the fact of the prior conviction from the court file pertaining to that prior conviction. The only "evidence" at the court trial was People's exhibit No. 1. (See fn. 6, *supra*.) We note

We are not confronted with the issue of whether the trial court would have been entitled to look beyond the judgment to the entire record of conviction to determine the truth of the enhancement. Clearly this would have been permissible. (*People v. Guerrero* (1988) 44 Cal.3d 343, 345, 355-356.) However, *Guerrero* did not hold Penal Code section 1025 no longer requires that when a defendant denies having suffered an alleged prior conviction, the issue, if jury is waived, must be "tried" by the court. *Guerrero*, in short, did not hold the People were no longer obligated to prove their case. In fact, *Guerrero* expressly declined to decide what items in a record of conviction were "admissible" (*People v. Guerrero, supra*, 44 Cal.3d at p. 356, fn. 1), thus using an *evidentiary* term. Accordingly, we conclude the court erred by finding true the allegation that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivision (d)(1), and 1170.12, subdivision (b)(1), and by imposing sentence accordingly.

Respondent argues in its supplemental brief that this case should be remanded for a retrial on the prior conviction allegation. We disagree. The fact that *People v. Reed* (1996) 13 Cal.4th 217, was decided after the present case was fully briefed is unavailing. The conclusion that the evidence was insufficient in the present case was mandated by *pre-Reed* law. Moreover, in *Piper, Jackson, and Williams, supra*, for example, there was insufficient evidence to support a Penal Code section 667, subdivision (a) enhancement. In each case, imposition of sentence on the enhancement was effectively barred, and no remand for retrial on the enhancement allegation occurred. (*People v. Piper, supra*, 42 Cal.3d at pp. 475-478; *People v. Jackson, supra*, 7 Cal.App.4th at pp. 1370-1373; *People v. Williams, supra*, 222 Cal.App.3d at pp. 914-918.)

Respondent's reliance upon *In re Moser* (1993) 6 Cal.4th 342, and *People v. Goodner* (1992) 7 Cal.App.4th 1324, for a contrary conclusion is misplaced. Neither

---

the sentencing comment omitted that, at the court trial, the court expressly referred to the taking of "judicial notice." In any event, the court file was used at the court trial only to prove the fact of the prior "conviction."

any) of relitigating the prior conviction allegation].) More importantly, double jeopardy does not apply to noncapital sentencing.

A. *People v. Equarte* (1986) 42 Cal.3d 456

As a preliminary matter, respondent asks this Court to decide whether *People v. Equarte* (1986) 42 Cal.3d 456, (as the Court of Appeal believed) requires respondent to prove appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault. If *Equarte* does not require such proof, this Court need only remand this case with instructions to affirm the judgment of conviction and sentence.

In *Equarte*, the defendant was charged with two counts of assault with a deadly weapon, and it was further alleged (in relevant part) he suffered a prior "serious felony" within the meaning of sections 667 and 1192.7, subdivision (c)(25) (a 1981 attempted robbery conviction). (*People v. Equarte, supra*, 42 Cal.3d at p. 459.) The complaint did not allege that the defendant's current substantive offenses (the two assault counts) were "serious felonies" within the meaning of sections 667 and 1192.7, subdivision (c), and it contained no allegation that the defendant had "personally used a dangerous or deadly weapon" as to the *current* assault counts. (*Ibid.*) A jury found defendant guilty of one assault count, and following a sentencing hearing (pursuant to which the defendant conceded his prior attempted robbery was a serious felony), the court enhanced defendant's sentence by five years pursuant to subdivision (a) of section 667. (*Id.*, at p. 460.) At sentencing, defendant argued the prosecution had neither pled nor



proved his current assault was a "serious felony" for purposes of subdivision (a) of section 667. (*Ibid.*) The sentencing court noted the prosecution had not specifically pled, nor had the jury specifically found, that defendant *personally* used a dangerous or deadly weapon. However, that court apparently concluded "no such pleading was required" and defendant's "personal use" for purposes of section 667 was adequately established since the evidence at trial clearly established there had been no accomplice as to the assault. (*Ibid.*) The Court of Appeal affirmed the assault conviction but reversed the five-year section 667 enhancement. (*Ibid.*)

This Court reversed the Court of Appeal insofar as it invalidated the section 667 enhancement. (*People v. Equarte, supra*, 42 Cal.3d at p. 467.) In the process of doing so, *Equarte* held: "[A]n assault-with-a-deadly-weapon conviction may constitute a 'serious felony' within the relevant statutes [section 667, subdivision (a), and section 1197.2, subdivision (c)] if the prosecution properly established that the defendant 'personally used a dangerous or deadly weapon' in the commission of the offense (§ 1192.7, subd. (c)(23))." (*Id.*, at pp. 459, 465.)

This case is factually distinguishable from *Equarte* for the simple reason that the assault issue there related to the underlying offense, and the "serious felony" determination related to subdivision (a) of section 667. Here, the assault issue relates to a prior felony conviction allegation, and the "serious felony" determination relates to subdivisions (b) through (i) of section 667. The Court of Appeal here obviously believed this is a distinction without a difference. Respondent disagrees.

Subdivision (a) of section 667 is an enhancement scheme. (See *People v. Martin* (1995) 32 Cal.App.4th 656, 666 ["An 'enhancement' is 'an additional term of imprisonment added to the base term'"], citing Cal. Rules of Court, rule 405(c).) By contrast, subdivisions (b) through (i) of section 667 (the Three Strikes Law) has been held not to be an enhancement at all. (*People v. Martin, supra*, 32 Cal.App.4th at pp. 666-668.) Rather, the Three Strikes Law "defines the term for the [current underlying] crime itself, supplanting the term that would apply but for the prior serious or violent felony." (*Id.*, at p. 667.) The Three Strikes Law applies to a defendant with a prior *serious and/or violent* felony who commits any new *felony*. (Pen. Code, § 667, subds. (b), (d)(1) and (e).)<sup>3/</sup> By contrast, subdivision (a) of section 667 applies to a defendant with a prior *serious* felony who commits a new *serious* felony. (Pen. Code, § 667, subds. (a)(1); *People v. Reed, supra*, 13 Cal.4th at p. 222.) Finally, trial judges have no discretion to dismiss or strike an enhancement under subdivision (a) of section 667. (Pen. Code, § 1385, subd (b).) By contrast, this Court has decided trial judges retain discretion to dismiss or strike priors found true under the Three Strikes Law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) Thus, subdivision (a) of section 667 and subdivisions (b) through (i) of section 667 are entirely different schemes, serve completely different objectives, and result in different forms of punishment in that trial judges retain discretion to dismiss or strike priors found true under the Three Strikes

---

3. The purpose of the Three Strikes Law is stated expressly in the law: "It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Pen. Code, § 667, subd. (b).)

Law but have no discretion to dismiss or strike an enhancement under subdivision (a) of section 667.

In light of the foregoing, why should the circumstances here be governed by *Equate*? That case stands for the proposition that if the prosecution seeks a five-year section 667 enhancement in a case where the defendant is charged with the crime of assault with a deadly weapon, the prosecution must prove the defendant "personally used a dangerous or deadly weapon" during the commission of the assault. (See *People v. Equarte*, *supra*, 42 Cal.3d at p. 464.) Nothing in *Equate* (or *People v. Reed*, *supra*, 13 Cal.4th 217) expressly requires that in order to impose a *Three Strikes* sentence, the prosecution must prove "personal use" as to the defendant's prior assault.

Admittedly, the common denominator between subdivision (a) of section 667 and subdivisions (b) through (i) of section 667 is that both statutes require reference to subdivision (c) of section 1192.7 in order to find a prior conviction a "serious felony." (Pen. Code, § 667, subds. (a)(4), (d)(1).) Further, subdivision (c) of section 1192.7 does not include "simple" assault with a deadly weapon among the specifically listed offenses included in its numerous categories. *Equate* notes this fact. (*People v. Equarte*, *supra*, 42 Cal.3d at pp. 462, 466.)

However, given that judges retain discretion to dismiss a true "strike" finding (*Romero*), but have no discretion to dismiss a true finding under subdivision (a) of section 667 (Pen. Code, § 1385, subd. (b)), it would be entirely fair if this Court refused to extend *Equate* to *Three Strikes* cases. If there is any question that a *Three Strikes* candidate personally inflicted great bodily injury and/or personally used a dangerous or deadly weapon as to a prior assault with a deadly weapon, the trial court could easily exercise its discretion under

*Romero*. The same luxury is not afforded under section 667, subdivision (a). Thus, it makes sense to force the prosecution to prove "personal use" for purposes of subdivision (a) of section 667, but not for purposes of *Three Strikes* sentencing.

## B. Double Jeopardy

Respondent submits the decision of the Court of Appeal should be reversed for any (or all) of the following reasons.

### 1. Double Jeopardy Does Not Apply To Noncapital Sentencing

This Court is obviously free to decide this case on any ground it sees fit. However, respondent urges this Court to hold double jeopardy does not apply to noncapital sentencing, as have courts in New York<sup>4/</sup> and Indiana.<sup>5/</sup>

In *Caspari*, the federal high court noted the holdings in New York and Indiana and noted the contrary rule adopted elsewhere.<sup>6/</sup> (*Caspari v. Bohlen*, *supra*, 510 U.S. at p. 394.) Writing for the *Caspari* majority (which included Chief Justice Rehnquist and Justices

---

4. *People v. Sailor* (1985) 491 N.Y.S.2d 112, 118-121 [65 N.Y.2d 224, 231-236] [held Fifth Amendment Double Jeopardy Clause does not apply to sentencing under state habitual offender statutes].

5. *Durham v. State* (Ind. 1984) 464 N.E.2d 321, 323-325 [held double jeopardy principles do not bar relitigating habitual offender charge (two prior felony conviction allegations) after earlier jury found charge not true].

6. See e.g., *Cooper v. State* (Tex. Crim.App. 1982) 631 S.W.2d 508, 513-514; *State v. Hennings* (1983) 670 P.2d 256, 259-262 [100 Wash.2d 379, 386-390]; *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368, 371.



Blackmun, Scalia, Kennedy, Souter, Thomas and Ginsburg), Justice O'Connor wrote:

"While our cases may not have foreclosed the application of the Double Jeopardy Clause to noncapital sentencing, neither did any of them apply the Clause in that context. On the contrary *Goldhammer* [*Pennsylvania v. Goldhammer* (1985) 474 U.S. 28 (*per curiam*)] and *Strickland* [*Strickland v. Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* [*Bullington v. Missouri* (1981) 451 U.S. 430] was limited to capital sentencing. We therefore conclude that a reasonable jurist reviewing our precedents at the time of respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari v. Bohlen*, *supra*, 510 U.S. at p. 393 (citation omitted).)

It is thus clear a majority of the current federal high court would in all probability hold double jeopardy does not apply to noncapital sentencing. Nevertheless, "[c]onstitutional law is not the exclusive province of the federal courts[.]" (*Caspari v. Bohlen*, *supra*, 510 U.S. at p. 395.) For this reason, respondent asks this Court hold double jeopardy does not apply to noncapital sentencing.

Respondent begins with a discussion of *Bullington v. Missouri* (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852], and *Arizona v. Rumsey* (1984) 467 U.S. 203 [81 L.Ed.2d 164, 104 S.Ct. 2305], since those cases, both involving bifurcated death penalty proceedings, are the source of the tension here.<sup>7/</sup>

---

7. The opposition argument is this: The issue of whether double

The issue in *Bullington* was whether (following the grant of defendant's motion for a new trial) double jeopardy barred Missouri from seeking the death penalty at retrial after a jury had sentenced the defendant to life imprisonment without the possibility of parole for 50 years following the penalty phase of the first trial. (*Bullington v. Missouri*, *supra*, 451 U.S. at pp. 432, 434, fn. 5, 437, fn. 8.)<sup>8/</sup> The *Bullington* majority began by observing: "It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has

---

jeopardy applies to a sentencing proceeding (capital or otherwise) turns on the extent to which the sentencing proceeding resembles a trial. (See *People v. Sailor*, *supra*, 65 N.Y.S.2d at pp. 122-125 [dissenting opn.]; *Durham v. State*, *supra*, 464 N.E.2d at pp. 325-326 [dissenting opn.]; *State v. Hennings*, *supra*, 670 P.2d at pp. 257-258, 260, 261-262 [the issue is whether the sentencing proceeding has the "hallmarks" of a trial on guilt or innocence]; *Briggs v. Procunier*, *supra*, 764 F.2d at p. 371; *Duroski v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359.) The United States Supreme Court has made it abundantly clear that the general rule is double jeopardy principles do not apply to sentencing proceedings. (See *Caspari v. Bohlen*, *supra*, 510 U.S. at p. 392 ["Respondent acknowledges our traditional refusal to extend the Double Jeopardy Clause to sentencing"]; see also *Bullington v. Missouri*, *supra*, 451 U.S. at p. 438; *United States v. DiFrancesco* (1980) 449 U.S. 117, 133, 137-138 [66 L.Ed.2d 328, 101 S.Ct. 426]; *North Carolina v. Pearce* (1969) 395 U.S. 711, 719-723 [23 L.Ed.2d 656, 89 S.Ct. 2072].) *Bullington* (and later *Rumsey*) represent an exception to the general rule in the case of capital sentencing. (*Caspari v. Bohlen*, *supra*, 510 U.S. at p. 392 ["Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing procedure"].) Thus, respondent submits extending *Bullington* to noncapital sentencing proceedings such as the instant would (in effect) swallow the general rule. This is precisely what Justice O'Connor noted while writing for the majority in *Caspari*. (*Id.*, at p. 393.)

8. Defendant *Bullington* was charged under Missouri law with "capital murder and other crimes arising out of the abduction of a young woman and her subsequent death by drowning." (*Bullington v. Missouri*, *supra*, 451 U.S. at p. 435 [footnote omitted].)



been *acquitted* of the crime charged." (*Id.*, at p. 437 [italics in original; citations omitted].) The court then noted it has "resisted attempts to extend that principle to sentencing" because "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." (*Id.*, at p. 438.)

The *Bullington* majority found, however, the sentencing procedures required under the Missouri death penalty statute "differ[ed] significantly from those employed in any of the Court's cases where the Double Jeopardy Clause ha[d] been held inapplicable to sentencing." (*Bullington v. Missouri, supra*, 451 U.S. at p. 438.) First, the "unbounded discretion" that normally applied to sentencing decisions was replaced by only two alternatives under the Missouri death penalty statute, death or life imprisonment without the possibility of parole for 50 years. (*Ibid.*) Second, the Missouri death penalty statute provided specific substantive standards to guide the jury's choice of the appropriate punishment in the form of 10 aggravating and 7 mitigating circumstances. (*Id.*, at pp. 434, 438.) Finally, the Missouri death penalty statute provided certain procedural safeguards, the most significant being that the prosecution carried the burden of proving "beyond a reasonable doubt" the existence of at least one aggravating circumstances not outweighed by mitigating circumstances. (*Id.*, at pp. 432-435, 438; see *Arizona v. Rumsey, supra*, 467 U.S. at p. 209 [discussing *Bullington*].)

The *Bullington* majority concluded the presentence hearing as to *Bullington* "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was like a trial on the issue of punishment[.]" (*Bullington v. Missouri, supra*, 451 U.S. at p. 438.) "In contrast, the sentencing procedures

considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence." (*Id.*, at p. 439.) Following a discussion of other cases, the *Bullington* majority held double jeopardy barred Missouri from seeking the death penalty at retrial because the sentencing proceeding at *Bullington*'s first trial was "like the trial on the question of guilt or innocence[.]" (*Bullington*, 451 U.S. at p. 446.)<sup>9/</sup>

Other than the fact that (in our state) a truthfulness proceeding *may* involve a (bifurcated) hearing before a jury<sup>10/</sup> in

---

9. Similarly, the majority of the court in *Rumsey* held, pursuant to *Bullington*, double jeopardy barred Arizona from sentencing the defendant to death after his original sentence of life imprisonment without the possibility of parole for 25 years (set by a judge without the assistance of a jury) was set aside by the state high court. (*Arizona v. Rumsey, supra*, 467 U.S. at pp. 205-206, 209.) The *Rumsey* majority reasoned: "The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer--the trial judge in Arizona--is required to choose between two options: death, and life imprisonment without the possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. [Citation.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri [at issue in *Bullington*]." (*Arizona v. Rumsey, supra*, 467 U.S. at pp. 209-210 [citation omitted].)

10. Respondent notes the state or federal Constitutions do not



which respondent carries the burden of proving beyond a reasonable doubt the prior felony conviction allegation is true,<sup>11</sup> a truthfulness proceeding is distinguishable from a capital sentencing proceeding in the following ways.

---

require jury determinations as to the truthfulness of a prior felony conviction allegation. Indeed, this Court has already held a California criminal defendant has a limited *statutory* right to a bifurcated jury trial to determine the truthfulness of such an allegation, and, in fact, such a defendant has no absolute right to bifurcation. (See *People v. Wiley*, *supra*, 9 Cal.4th at pp. 585-586; *People v. Calderon* (1994) 9 Cal.4th 69, 76-78.)

11. Although this Court has labeled the prosecution's burden of proving a prior conviction allegation true beyond a reasonable doubt a "cardinal principle of criminal jurisprudence" under the Due Process Clause (*People v. Tenner* (1993) 6 Cal.4th 559, 566), that notion is without federal or even state constitutional support. Indeed, the federal Constitution allows for the determination of a sentencing-type proceeding to be proved by a preponderance of the evidence, not proof beyond a reasonable doubt. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 84-93 [91 L.Ed.2d 67, 106 S.Ct. 2411, 2415-2419]; *Patterson v. New York* (1977) 432 U.S. 197, 201-202, 207, 210, 211, fn. 12, 214 [53 L.Ed.2d 281, 97 S.Ct. 2319]; see also *Garrett v. United States* (1985) 471 U.S. 773, 782 [85 L.Ed.2d 764, 105 S.Ct. 2407] ["the determination that a defendant is a dangerous special drug offender [under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848] is made on a preponderance of the information by the court"]; *People v. Sailor*, *supra*, 491 N.Y.S.2d at p. 120 ["In a persistent felony offender hearing, for example, the prosecution need only prove by a preponderance of the evidence that a defendant's history and character and the nature and circumstances of his criminal conduct warrant persistent felon treatment"]; but see *People v. Tenner*, *supra*, 6 Cal.4th at p. 566; *People v. Morton*, *supra*, 41 Cal.2d at p. 539.) Respondent submits there is no federal or state constitutional support for the notion that the proof of the truth of a prior felony conviction allegation must be beyond a reasonable doubt as a matter of federal or state constitutional law. Respondent notes this issue was thoroughly briefed in the reply brief filed by the People in *People v. Hernandez* (S047306), currently pending on review in this Court.

First, the adjudicator of a prior felony conviction allegation only has two options to choose from (true, or not true). Such an adjudicator is not being asked to decide whether the accused should be put to death, or sentenced to life imprisonment without the possibility of parole for a determinate (or indeterminate) number of years.

Second, the adjudicator of a prior felony conviction allegation is not guided by detailed statutory standards defining aggravating and mitigating circumstances, as is the case concerning capital sentencing. Rather, such an adjudicator is only being asked to decide whether the defendant is a recidivist as defined by the applicable recidivist statute.

Third, the adjudicator of a prior felony conviction allegation is concerned solely with the defendant's prior criminal record. By contrast, capital sentencing necessarily involves aggravating and/or mitigating factors so closely related to the commission of the underlying murder that the *punishment* ultimately imposed is essentially part of the substantive crime. (See *People v. Superior Court (Marks)*, *supra*, 1 Cal.4th at p. 78, fn. 22.)

Fourth, *Bullington* turned, in part, on the following reasoning: "The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilty phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' [citation], thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate

punishment." (*Bullington v. Missouri*, *supra*, 451 U.S. at 445-446.)

The same cannot be said for a defendant facing a truthfulness finding of recidivism, especially considering the fact that unless removed (e.g., successfully collaterally attacked), the prior felony conviction will remain on the defendant's criminal resume and may be used (where applicable) as often as the defendant chooses to commit new crimes. In any event, any embarrassment, anxiety, or insecurity a first-time defendant may feel at the guilt phase of a criminal trial, is diminished in the case of a habitual offender facing noncapital sentencing because the recidivist by definition is well-acquainted with the criminal justice system (either in California or some other jurisdiction).

Fifth, the distinction between death penalties and noncapital sentencing is reasonable because death as a punishment is tied exclusively to commission of an underlying murder, while recidivism as a punishment depends on prior felony convictions, which, together with one more felony conviction results in an increased sentence (e.g., the Three Strikes Law). In short, the death penalty is crime specific, while determinations of repeat offender status are generic to all felonies. (See *People v. Sailor*, *supra*, 491 N.Y.S.2d at p. 119.) Indeed, a recidivist statute does not establish a separate offense. Rather, recidivist statutes (such the Three Strikes Law) provide for the imposition of a more severe sentence for the substantive crime charged because the defendant suffered qualifying prior convictions. The purpose of such laws (unlike the death penalty) is to more severely penalize those persons whom prior sanctions have failed to deter from committing felonies. (See *People v. Jackson* (1985) 37 Cal.3d 826, 833, citing *In re Foss* (1974) 10 Cal.3d 910, 922; *In re Rosencrantz* (1928) 205 Cal. 534,

538 [upheld against cruel or unusual punishment attack term of life without the possibility of parole for fraudulent uttering a check without sufficient funds after three prior felony convictions]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382, 100 S.Ct. 1133]; *Durham v. State*, *supra*, 464 N.E.2d at pp. 323-324.)

Sixth, practical considerations also warrant holding double jeopardy does not apply to noncapital sentencing. Arguably, but in no way conceded by respondent, extension of the double jeopardy clause to truthfulness proceedings would seemingly mean that a failure to prove a defendant's prior felony conviction for any reason, even prosecutorial mistake or carelessness, unrelated to the truth of such prior convictions, would forever bar the use of that prior conviction in any subsequent sentencing proceeding. (See *People v. Sailor*, *supra*, 491 N.Y.S.2d at p. 121; but see *Cooper v. State*, *supra*, 631 S.W.2d at p. 514.)

The above factors are the primary reasons why New York (*People v. Sailor*, *supra*, 491 N.Y.S.2d at pp. 118-121 (4-to-2 decision)) and Indiana (*Durham v. State*, *supra*, 464 N.E.2d at pp. 323-325 (3-to-2 decision)) decided double jeopardy does not bar relitigating an habitual offender charge as to their recidivist schemes.

Finally, as noted earlier, the state or federal Constitutions do not require jury determinations as to the truthfulness of a prior felony conviction allegation. A California criminal defendant has a limited statutory right to a bifurcated jury trial to determine the truthfulness of such an allegation, and, in fact, such a defendant has no absolute right to bifurcation. (See *People v. Wiley*, *supra*, 9 Cal.4th at pp. 585-586; *People v. Calderon*, *supra*, 9 Cal.4th at pp. 76-78.) "The absence of any federal constitutional requirement that a jury determine the truth of prior conviction allegations is reflected in the circumstance that most



jurisdictions in the United States do not grant the defendant a right to a jury determination of such sentencing issues." (*People v. Wiley, supra*, 9 Cal.4th at p. 585; see *People v. Calderon, supra*, 9 Cal.4th at p. 76.) "Of those states, like California, that allow the jury to determine the truth of prior convictions alleged for purposes of sentence enhancement, at least 16 provide by statute for bifurcation of the proceedings relating to the truth of the alleged prior conviction." (*People v. Calderon, supra*, 9 Cal.4th at pp. 76-77 [footnote omitted].)

Given the fact that (1) a California criminal defendant has no state or federal constitutional right to a jury determination (bifurcated or otherwise) as to the truthfulness of a prior felony conviction allegation, (2) in such a proceeding the trier of fact is not being asked to decide whether the defendant should be put to death or sentenced to a life term, (3) the trier of fact is only being asked to decide whether a prior felony conviction allegation is true or not true, (4) a prior felony conviction allegation is not so closely related to the commission of the underlying crime that the punishment ultimately imposed is essentially part of the substantive crime, (5) any embarrassment, anxiety, or insecurity a first-time defendant may feel at the guilt phase of a criminal trial is diminished in the case of a habitual offender facing noncapital sentencing, (6) a prior felony conviction allegation does not create a separate "offense" (see discussion below), and (7) practical considerations warrant holding double jeopardy does not apply to noncapital sentencing because extension of double jeopardy to noncapital sentencing proceedings would seemingly mean that a failure to prove a defendant's prior felony conviction for any reason would forever bar the use of that prior conviction in any subsequent sentencing proceeding, respondent urges this Court to join New York

and Indiana in holding double jeopardy does not apply to noncapital sentencing.

## 2. A "Strike" Allegation Is Not An "Offense" Within The Meaning Of Double Jeopardy

Murder, of course, is a "substantive offense." (*People v. Santamaria* (1994) 8 Cal.4th 903, 917-918.) However, a knife use allegation pled with a murder offense does not create a separate offense. Rather, the knife use allegation is "merely a sentence enhancing allegation attached to the murder charge." (*Id.*, at p. 918.) Similarly, a "Three Strikes" allegation (or any other type of prior felony conviction allegation) pled with a substantive offense does not create a separate offense. Rather, the "strike" allegation is merely a sentencing enhancing allegation attached to the underlying substantive offense. In *People v. Martin, supra*, 32 Cal.App.4th at pp. 666-668, the appellate court held the sentencing provision of the legislative version of the Three Strikes Law (§§ 667, subd. (e); see 1170.12, subd. (c) [voter's initiative version]) is *not* an enhancement. Respondent agrees,<sup>12/</sup> and adds it is also not an "offense" within the meaning of

12. However, even if this Court were to find sentencing under the Three Strikes Law constitutes an enhancement, respondent submits that determination would not mean that a "strike" allegation creates a separate "offense" for purposes of double jeopardy. In *People v. Wims* (1995) 10 Cal.4th 293, this Court distinguished statutes that articulate a penalty provision from those that create a substantive crime or offense. (*Id.*, at p. 305 ["section 12022(b) articulates a *penalty provision*, not a substantive crime"] [italics in original], citing among other cases *People v. Hernandez* (1988) 46 Cal.3d 194, 207-208.) "California courts have long recognized that '[a]n enhancement is not a separate crime or offense . . .'" (*People v. Wims, supra*, 10 Cal.4th at p. 304 (citations omitted).) "Enhancements typically focus on an element of the

double jeopardy. (See *North Carolina v. Pearce*, *supra*, 395 U.S. at p. 717 [the double jeopardy guarantee consists of three separate constitutional protections: it protects against a second prosecution for the same offense after acquittal, it protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense]; *People v. Morton*, *supra*, 41 Cal.2d at p. 543 ["Proof of prior convictions or the adjudication that the defendant is an habitual criminal does not involve substantive offenses, but merely provides for increased punishment of those whose prior convictions fall within the scope of these statutes"].)

Both this Court and the federal high court have long held that recidivist sentencing provisions (such as subdivision (e) of section 667 and subdivision (c) of section 1170.12) do not create substantive offenses. Rather, such laws provide for the imposition of a more severe sentence for the substantive offense charged because the defendant suffered qualifying prior convictions. (See *People v. Jackson*, *supra*, 37 Cal.3d at p. 833 ["In the context of habitual criminal statutes, 'increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent

---

commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves." (*People v. Hernandez*, *supra*, 46 Cal.3d at pp. 207-208 [held section 667.8 (kidnapping for purposes of rape or other sexual offense whereupon a three year additional term may be imposed) is not a substantive offense]; *People v. Wims*, *supra*, 10 Cal.4th at p. 304.) The *Wims* court stated: "That an enhancement resembles a substantive offense, insofar as it imposes additional punishment based upon a factual finding that a defendant engaged in particular conduct, may be true. Such similarity, however, does not elevate to federal constitutional stature defendants' section 12022(b) jury rights." (*People v. Wims*, *supra*, 10 Cal.4th at p. 304.)

offense rather than a penalty for the prior offense"; *In re Rosencrantz*, *supra*, 205 Cal. at p. 538 ["... The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course"] [citation omitted]; *Nichols v. United States* (1994) 511 U.S. 738, \_\_ [128 L.Ed.2d 745, 114 S.Ct. 1921, 1927] ["Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction"]; *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 284-285.) Clearly, there can be no double jeopardy violation based on relitigating the truthfulness of a prior felony conviction allegation when such an allegation does not create a substantive offense. (See *People v. Morton*, *supra*, 41 Cal.2d at p. 543.)

In any event, in *People v. Visciotti* (1992) 2 Cal.4th 1, this Court affirmed a death verdict in which the defendant claimed it was a violation of double jeopardy to introduce evidence of his past criminal conduct in the penalty phase. Writing for the majority (which included Chief Justice George and Justice Kennard), Justice Baxter wrote in *Visciotti*: "The presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence." (*Id.*, at p. 71, citing *People v. Melton* (1988) 44 Cal.3d 713, 756, fn. 17 ["We conclude, however, that one is



not placed 'twice in jeopardy for the same offense' when the details of misconduct which has already resulted in conviction and punishment, or in dismissal pursuant to a plea bargain or for witness unavailability, are presented in a later proceeding on the separate issue of the appropriate penalty for a *subsequent* offense. [Citation.] Such a procedure is proper, in our view, even if the defendant must thereby endure the 'ordeal' of a second 'trial'" [citation omitted; italics in original], and noting the Court rejected "similar claims" in *People v. Karis* (1988) 46 Cal.3d 612, 640, and *People v. Gates* (1987) 43 Cal.3d 1168, 1203; see also *People v. Wharton* (1991) 53 Cal.3d 522, 601-602 ["Defendant claims the People were permitted to relitigate his 1975 crimes in violation of the constitutional proscription against placing a criminal defendant twice in jeopardy. [Citations.] We have previously rejected this claim [citations], and defendant does not present persuasive reasons why we should reconsider those decisions"] [footnote omitted]; *People v. McDowell* (1988) 46 Cal.3d 551, 568 ["we reject defendant's claim that the introduction of evidence of his prior offense constituted double jeopardy. Defendant was not placed twice in jeopardy for the same offense; rather, evidence of the offense was admitted to assist the jury in its determination of the appropriate sentence"].)

It would be anomalous if this Court were to hold double jeopardy does *not* apply to the introduction of evidence of the defendant's prior felony convictions in a capital sentencing proceeding, but *applies* in a noncapital sentencing proceeding. This would be bizarre (if for no other reason) because a prior felony conviction allegation does not create a separate "offense."<sup>13/</sup> (See *Garrett v.*

13. The Double Jeopardy Clause of the Fifth Amendment

*United States, supra*, 471 U.S. at p. 782 ["the very next section of the statute entitled 'Dangerous Special Drug Offender Sentencing' is a recidivist provision. It is drafted in starkly contrasting language which plainly is not intended to create a separate offense"]; see e.g., *People v. Saunders, supra*, 5 Cal.4th at p. 593.)

Indeed, *Garrett v. United States, supra*, 471 U.S. 773, is instructive. There, the federal high court was asked to "examine the double jeopardy implications of a prosecution for engaging in a 'continuing criminal enterprise' (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make a CCE violation." (*Id.*, at p. 775.) The petitioner urged double jeopardy barred a CCE prosecution. (*Ibid.*) The majority disagreed. (*Id.*, at p. 795 ["We think here logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense. Congress may, of course, so provide if it wishes"].)

The *Garrett* majority arrived at its result as follows: First, it addressed petitioner's claim that CCE "is a separate substantive offense[.]" (*Garrett v. United States, supra*, 471 U.S. at p. 777.) After discussing the legislative history and language set forth in the applicable statute, the majority concluded Congress intended CCE to be a "separate offense[.]" (*Id.*, at pp. 778-786.) Next, the majority turned to

---

provides "nor shall any person be subjected for the same *offense* to be twice put in jeopardy of life or limb[.]" (Emphasis added.) The parallel provision in the California Constitution, embodied in article I, section 15 of the California Constitution, provides "[p]ersons may not twice be put in jeopardy for the same *offense*." (Emphasis added.)

the issue of what effect (if any) double jeopardy principles had on its conclusion that CCE is a separate offense. (*Id.*, at p. 786 ["The critical inquiry is whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause"].) The majority answered that question in the negative. (*Id.*, at p. 786 ["Quite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses"]; see *Id.*, at pp. 786-795.)

Thus, even if this Court were to find our Legislature (or the voters) intended the Three Strikes Law to be a separate offense, the federal Constitution would not require application of double jeopardy principles to such an "offense" as demonstrated in *Garrett v. United States*, *supra*, 471 U.S. 773. Further, as noted earlier, in the context of a truthfulness proceeding as to a prior conviction allegation, if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders*, *supra*, 5 Cal.4th at p. 596.)

Based on the foregoing, respondent submits a prior felony conviction allegation is not an "offense" within the meaning of double jeopardy, and thus, double jeopardy does not bar relitigation here.

### 3. *People v. Morton* (1953) 41 Cal.2d 536

*Morton* held upon reversal of a prior conviction finding due to insufficient evidence, if the defect in proof is capable of correction on retrial, the appropriate remedy is a limited retrial on the prior conviction allegation. (*People v. Morton*, *supra*, 41 Cal.2d at pp. 542, 544-545.) Respondent has already shown that double jeopardy does not apply to noncapital sentencing, and, in any event, a prior felony

conviction allegation is not an "offense" within the meaning of double jeopardy. For these reasons, there was no need for the *Morton* court to assess the double jeopardy issue, and thus, *Morton* should govern here. (*Id.*, at pp. 544-545 [the remand remedy "carries out the policy of the statutes imposing 'more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment' [citation], and prevents defendants from escaping the penalties imposed by those statutes through technical defects in pleading or proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment"] [former (then) Justice Traynor writing for the majority]; see *People v. Saunders*, *supra*, 5 Cal.4th at p. 596 ["a procedure calling for the impanelling of a new jury to determine the truth of alleged prior convictions following the return of a guilty verdict in a bifurcated proceeding would not offend the double jeopardy clause"]; see also *People v. Latimer*, *supra*, 5 Cal.4th at p. 1213 [discussing stare decisis].) Under *Morton*, this case should be remanded to the trial court for a redetermination of whether the prior felony conviction allegation was true or not true.

In any event, "[t]he evils against which the double jeopardy clause is directed [are] absent in the present situation." (See *People v. Saunders*, *supra*, 5 Cal.4th at p. 595; see also *People v. Valladoli*, *supra*, 13 Cal.4th at p. 609.) The double jeopardy "evils" are: (1) allowing the prosecution the forbidden "second crack" at supplying evidence it failed to produce in an earlier proceeding; (2) enhancing the risk that an innocent person would be convicted by taking the question of guilt to a series of persons or groups empowered to make binding determinations; and (3) unfairly subjecting the defendant to the



embarrassment, expense, and ordeal of a second trial. (*People v. Saunders, supra*, 5 Cal.4th at p. 594, citing *Swisher v. Brady* (1978) 438 U.S. 204, 215-216 [57 L.Ed.2d 705, 98 S.Ct. 2699] [internal quotations omitted].)

The first double jeopardy "evil" (allowing the prosecution the forbidden "second crack" at supplying evidence it failed to produce in an earlier proceeding) is of no concern here because the jury found the "strike" allegation true. It was the Court of Appeal which concluded respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's assault. Respondent did not know (and this Court is being asked to decide here) whether respondent had to prove the foregoing. Indeed, the Court of Appeal raised the instant issue on its own motion, pursuant to which the parties filed supplemental letter briefs. Under these circumstances, it would be an "evil" to bar respondent from relitigating the truthfulness of appellant's 1992 assault conviction.

The second double jeopardy "evil" (enhancing the risk that an innocent person would be convicted by taking the question of guilt to a series of persons or groups empowered to make binding determinations) is of no concern here because relitigation would involve the simple act of proving the truthfulness of whether the defendant suffered a prior felony conviction based on the record of the proceeding concerning the prior felony conviction. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 355 ["in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction"] ["To allow the trier to look to the record of the

conviction--but no further--is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy . . ."] [italics in original]; *People v. Myers* (1993) 5 Cal.4th 1193, 1201; see also *People v. Morton, supra*, 41 Cal.2d at pp. 538-540.) This can easily be tried to the court, or to a new jury. (See *People v. Saunders, supra*, 5 Cal.4th at p. 596.) Indeed, writing for the majority (which included Chief Justice George, Justice Kennard and Justice Baxter), Justice Werdegard stated in *Valladoli*:

"Thus, '[t]he evils against which the double jeopardy clause is directed were absent in the present situation.' (*People v. Saunders, supra*, 5 Cal.4th at p. 595.) Indeed, it would not necessarily violate the state or federal constitutional provisions against double jeopardy for the state to prescribe a *new jury* be impanelled to try any felony conviction allegations. (*Id.*, at pp. 595-596.) That being the case, to permit an amended filing and have *the same jury* determine the truth of the prior felony conviction allegations cannot violate double jeopardy." (*People v. Valladoli, supra*, 13 Cal.4th at p. 609 [italics in original].)

There would be no logical reason for allowing a truthfulness proceeding where the prior felony conviction is alleged *after* the jury reaches its verdict on a substantive offense (*Valladoli*), but disallowing relitigation where an appellate court reverses a true finding on insufficiency grounds (the instant case). The same "evil" is *absent* under both scenarios.

The third double jeopardy "evil" (unfairly subjecting the defendant to the embarrassment, expense, and ordeal of a second trial) is of no concern here because a habitual offender (by definition) is

well-acquainted with the criminal justice system. If the recidivist is "embarrassed" or worried about the "expense," he or she can always request a court trial and/or appointment of counsel. In any event, it is clear the recidivist would suffer no "ordeal" since such a proceeding arguably involves nothing more than a hearing based on the record of the proceeding from the prior felony conviction.

Further, the decision in *Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141], does not change the outcome here. There, the federal high court held double jeopardy bars the prosecution from subjecting an accused to a second trial when the conviction is reversed on appeal for insufficient evidence. *Burks* involved double jeopardy in the context of a substantive offense (bank robbery). The instant case involves double jeopardy in the context of a truthfulness proceeding involving a prior felony conviction. This fact makes the instant case distinguishable from *Burks*.

In any event, while it is true the instant Court of Appeal reversed the "strike" finding on insufficiency grounds, it did so, as discussed above, because in that court's opinion respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault. This fact makes the instant case distinguishable from *Burks*, where the prosecution "failed to muster" sufficient evidence in the first proceeding to rebut *Burks*'s insanity defense. (*Burks v. United States*, *supra*, 437 U.S. at pp. 2-3, 11; see *People v. Superior Court (Marks)*, *supra*, 1 Cal.4th at p. 72.)

Indeed, "[i]t has long been settled . . . that the Double Jeopardy Clause's general prohibition against successive prosecutions

does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct or collateral attack, because of some error in the proceedings leading to conviction." (*Lockhart v. Nelson* (1988) 488 U.S. 33, 38 [102 L.Ed.2d 265, 109 S.Ct. 285] [citations omitted]; *Burks v. United States*, *supra*, 437 U.S. at p. 14; *People v. Santamaria*, *supra*, 8 Cal.4th at pp. 910-911.) Respondent submits there was an error in the proceedings leading to the true finding in this case if respondent was required to prove a fact no one believed was warranted. As noted above, the Court of Appeal raised the *Equarte* issue on its own motion. No party saw the issue at trial (or on appeal). As the high court noted in *Lockhart*: "*Burks* was careful to point out that a reversal based solely on evidentiary insufficiency had fundamental different implications, for double jeopardy purposes, than a reversal based on such ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence.'" (*Lockhart v. Nelson*, *supra*, 488 U.S. at p. 40 [citation omitted].) "While the former is in effect a finding 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect.'" (*Id.*, at p. 273 [citation omitted; italics in original].)

The instant case is similar to the situation in *Lockhart v. Nelson*, *supra*, 488 U.S. 33, where the federal high court held double jeopardy did not bar retrial of a conviction reversed by a reviewing court because some evidence has been improperly admitted. *Lockhart* is the instant case in reverse. In *Lockhart*, the evidence was insufficient because a federal habeas proceeding later proved a prior conviction



used at trial had been pardoned. (*Lockhart, v. Nelson, supra*, 488 U.S. at p. 34 ["We conclude that in cases such as this, where the evidence offered by the State and admitted by the trial court--whether erroneously or not--would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial"].) Here, the evidence was purported insufficient because the Court of Appeal later held respondent should have proved a fact no trial (or appellate) party believed was necessary. In the words of the *Lockhart* majority, "this is a situation described in *Burks* as reversal for 'trial error[.]'" (*Id.*, at p. 40.)<sup>14/</sup> This is especially true given the fact that here, as in *Lockhart*, "[n]othing in the record suggests any misconduct in the prosecutor's submission of the evidence." (*Id.* at p. 34, 37, fn. 2.)

"The basis for the *Burks* exception to the general rule is that a reversal for insufficiency of the evidence should be treated no different than a trial court's granting a judgment of acquittal at the close of all the evidence." (*Lockhart v. Nelson, supra*, 488 U.S. at p. 41.) The same cannot be said when a reviewing court reverses a *true finding* because in its opinion the People failed to prove a fact no trial (or appellate) party believed was necessary. "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the

---

14. In any event, the federal high court has stated: "The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." (*United States v. DiFrancesco, supra*, 449 U.S. at p. 144 [citations omitted]; *People v. Saunders, supra*, 5 Cal.4th at p. 593; see also *People v. Superior Court (Marks), supra*, 1 Cal.4th at p. 72 ["to gauge the import and application of double jeopardy principles in the present context, we must take careful measure of the precise terms and circumstances of the defendant's conviction"] [footnote omitted].)

defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt [or prior felony conviction] free from error.'" (*Id.*, at p. 42 [citations omitted]; *People v. Santamaria, supra*, 8 Cal.4th at p. 911.)

The instant case is also similar to the situation in *United States v. DiFrancesco, supra*, 449 U.S. 117. There, the defendant was convicted of being a "dangerous special offender" under a federal statute (the Organized Crime Control Act of 1970, 18 U.S.C. § 3576) wherein the district court sentenced defendant to two ten-year prison terms to be served concurrently with each other and with a nine-year sentence previously imposed on convictions at an unrelated federal trial. (*Id.*, at pp. 118-119, 122-123.) This sentence resulted in defendant being punished for only one year as to the "dangerous special offender" offense. (*Id.*, at pp. 122-123.) The statute allowed the federal prosecutors to appeal under the given circumstances, and they did. The circuit court dismissed the appeal on double jeopardy grounds. The high court reversed. (*Id.*, at pp. 119-121, 123, 138-139, 143.)

The *DiFrancesco* majority framed the ultimate issue as "whether the increase of a sentence on review . . . constitutes multiple punishment in violation of the Double Jeopardy Clause." (*United States v. DiFrancesco, supra*, 449 U.S. at p. 138.) Answering that question in the negative, the majority reasoned, in relevant part, "our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation." (*Id.*, at p. 132.) The *DiFrancesco* majority noted: "This

Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." (*Id.*, at p. 134.) The *DiFrancesco* majority also noted: "The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence." (*Id.*, at p. 136.) Finally, "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." (*Id.*, at p. 137; see e.g., *Bullington v. Missouri*, *supra*, 451 U.S. at pp. 441-442, fn. 15 ["The history of sentencing practices [discussed in *DiFrancesco*] is of little assistance to Missouri in this case, since the sentencing procedures for *capital* cases instituted after the decision in [*Furman v. Georgia* (1972) 408 U.S. 238] are *unique*"] [*italics added*].)

Based on the foregoing, it is abundantly clear the federal Double Jeopardy Clause does not bar relitigation of a prior felony conviction for purposes of noncapital sentencing. It is equally clear that in the context of a truthfulness proceeding as to a prior conviction allegation, if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders*, *supra*, 5 Cal.4th at p. 596.) For these reasons, this Court's decision in *Morton* is sound, and governs here. (*People v. Morton*, *supra*, 41 Cal.2d at pp. 542, 544-545.) In any event, for the above reasons, relitigating the truthfulness of a prior felony conviction would not violate double jeopardy principles.

## II.

**PEOPLE V. REED (1996) 13 CAL.4TH 217, SHOULD  
APPLY TO CASES PENDING AT THE TIME IT  
WAS DECIDED**

This Court noted in *Reed*: "In *Guerrero* [*People v. Guerrero*, *supra*, 44 Cal.3d 343] we declined to address any question regarding 'what items in the record of conviction are admissible and for what purpose.'" (*People v. Reed*, *supra*, 13 Cal.4th at p. 223 [citation and footnote omitted].) *Reed* required this Court "to resolve two such issues of admissibility." (*Ibid.*) Ultimately, *Reed* (decided after initial appellate briefing in this case) held excerpts from a preliminary hearing transcript are admissible under the former testimony exception (Evid. Code, § 1291) to the hearsay rule (Evid. Code, § 1200) to prove the substance of a prior conviction, but excerpts from a probation report are inadmissible hearsay and thus may not be used to prove the substance of a prior conviction. (*Id.*, at pp. 225-231.) As will appear, *Reed* should apply to this case if it is remanded for a truthfulness proceeding as to appellant's prior assault.

This Court stated in *Guerrero*: "We conclude that in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." (*People v. Guerrero*, *supra*, 44 Cal.4th at p. 345.) However, as *Reed* notes: "Neither *Guerrero* nor *People v. Myers*, *supra*, 5 Cal.4th 1193, contains a definition of 'record of conviction' or a discussion of what the term means in this context." (*People v. Reed*, *supra*, 13 Cal.4th at p. 223.) In *Reed*, the parties conceded a preliminary hearing transcript is included in the definition of "record of conviction." (*Ibid.*) No doubt the parties conceded the point because, as *Reed* notes, various appellate decisions



had reached that result. (*People v. Reed*, *supra*, 13 Cal.4th at p. 229; see *People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1701-1704; *People v. Goodner* (1990) 226 Cal.App.3d 609, 614-616; *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1170-1174.)

It is readily apparent *Reed*'s holding (a preliminary hearing transcript is admissible to prove the truthfulness of a prior felony conviction allegation) was not a "new rule" subject to the general rule of prospective application only. (See *Teague v. Lane* (1989) 489 U.S. 288, 301 [103 L.Ed.2d 334, 109 S.Ct 1060] [plurality opn. by O'Connor, J] ["a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government"] ["To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"] [citations omitted; italics in original]; see e.g., *People v. Scott* (1994) 9 Cal.4th 331, 356-358; *People v. Welch* (1993) 5 Cal.4th 228, 238; *People v. Collins* (1986) 42 Cal.3d 378, 388.) Indeed, *Reed* states, "we reach the same result as those courts [*Gonzales*, *Goodner* and *Castellanos*][.]" (*People v. Reed*, *supra*, 13 Cal.4th at p. 229.) Thus, there is no reason respondent should be barred from proving the truthfulness of appellant's prior assault conviction on remand with the preliminary hearing transcript from that proceeding. This is particularly true given the fact, as *Reed* notes, *Guerrero* "precluded the prosecution from calling live witnesses to the criminal acts in the prior case." (*Id.*, at p. 226.)

## CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the decision of the Court of Appeal be reversed, and that this case be remanded to the trial court for relitigation of the "strike" allegation.

Dated: January 23, 1997.

Respectfully submitted,

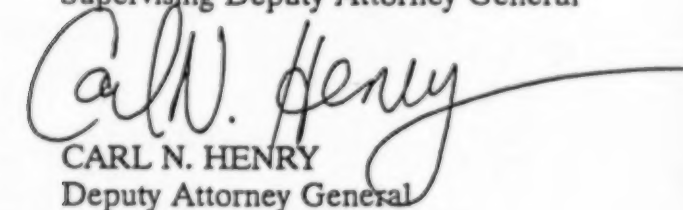
DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

CAROL WENDELIN POLLACK  
Senior Assistant Attorney General

SUSAN D. MARTYNEC  
Supervising Deputy Attorney General

PAMELA C. HAMANAKA  
Supervising Deputy Attorney General

  
CARL N. HENRY  
Deputy Attorney General

Attorneys for Respondent

CNH:cnh  
LA95DA2024

DECLARATION OF SERVICE BY MAIL

Re: *PEOPLE v. ANGEL JAIME MONGE; NO. S05581*

I, F. MITCHELL, declare that I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013; I served one copy of the attached

RESPONDENT'S BRIEF ON THE MERITS

on each of the following, by placing same in an envelope addressed as follows:

Gilbert Garcetti  
Los Angeles District Attorney  
Attn: Larry Larson  
Deputy District Attorney  
400 Civic Center Plaza, Suite 201  
Pomona, California 91766

Clifford Gardner  
Attorney at Law  
900 North Point  
Suite 220  
San Francisco, CA 94109

Honorable John A. Clarke  
County Clerk/Executive Officer  
Los Angeles County Superior Court  
111 North Hill Street  
Los Angeles, CA 90012  
FOR DELIVERY TO: Sam Cianchetti, Judge

I delivered/mailed a copy of the (Respondent's Brief on the Merits) to the Clerk of the Court of Appeal, Second Appellate District, Division Three, 300 South Spring Street, Los Angeles, CA 90013.

Each said envelope was then, on JAN 23 1997, sealed and deposited in the United States mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JAN 23 1997, at Los Angeles, California.

CNH:ksa  
LA95DA2024

Declarant  
F. MITCHELL

APPENDIX E



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANGEL JAIME MONGE,

Defendant and Appellant.

S055881

Second Appellate District, Division Three, No. B094905  
Los Angeles County Superior Court No. KA025876  
The Honorable Sam Cianchetti, Judge

RESPONDENT'S BRIEF ON THE MERITS

DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

CAROL WENDELIN POLLACK  
Senior Assistant Attorney General

SUSAN D. MARTYNEC  
Supervising Deputy Attorney General

PAMELA C. HAMANAKA  
Supervising Deputy Attorney General

CARL N. HENRY  
Deputy Attorney General  
State Bar No. 168047

300 South Spring St.  
Los Angeles, CA 90013  
Telephone: (213) 897-2273  
Fax: (213) 897-2063

Attorneys for Respondent

Table of Contents

	<u>Page</u>
STATEMENT OF THE CASE	1
ISSUES PRESENTED	2
STATEMENT OF FACTS	2
ARGUMENT	4
I. ALLOWING RELITIGATION OF A PRIOR FELONY CONVICTION WOULD NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY	4
A. <i>People v. Equarte</i> (1986) 42 Cal.3d 456	6
B. Double Jeopardy	10
1. Double Jeopardy Does Not Apply To Noncapital Sentencing	10
2. A "Strike" Allegation Is Not An "Offense" Within The Meaning Of Double Jeopardy	20
3. <i>People v. Morton</i> (1953) 41 Cal.2d 536	25
II. <i>PEOPLE V. REED</i> (1996) 13 CAL.4TH 217, SHOULD APPLY TO CASES PENDING AT THE TIME IT WAS DECIDED	35
CONCLUSION	37

Table of Authorities

<u>Cases</u>	<u>Page</u>
<i>Arizona v. Rumsey</i> (1984) 467 U.S. 203 [81 L.Ed.2d 164, 104 S.Ct. 2305]	11, 13, 14
<i>Benton v. Maryland</i> (1969) 395 U.S. 784 [23 L.Ed.2d 707, 89 S.Ct. 2056]	4
<i>Briggs v. Procnier</i> (5th Cir. 1985) 764 F.2d 368	10, 12
<i>Bullington v. Missouri</i> (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852]	11-14, 17, 33
<i>Burks v. United States</i> (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]	29, 30
<i>Caspari v. Bohlen</i> (1994) 510 U.S. 383 [127 L.Ed.2d 236, 114 S.Ct. 948]	5, 10-12
<i>Cooper v. State</i> (Tex. Crim.App. 1982) 631 S.W.2d 508	10, 18
<i>Durham v. State</i> (Ind. 1984) 464 N.E.2d 321	10, 12, 18
<i>Duroski v. Lewis</i> (9th Cir. 1989) 882 F.2d 357	12
<i>Furman v. Georgia</i> (1972) 408 U.S. 238	33
<i>Garrett v. United States</i> (1985) 471 U.S. 773 [85 L.Ed.2d 764, 105 S.Ct. 2407]	15, 24, 25
<i>In re Foss</i> (1974) 10 Cal.3d 910	17

Table of Authorities, cont'd

<i>In re Rosencrantz</i> (1928) 205 Cal. 534	18, 22
<i>Lockhart v. Nelson</i> (1988) 488 U.S. 33 [102 L.Ed.2d 265, 109 S.Ct. 285]	30, 31
<i>McMillan v. Pennsylvania</i> (1986) 477 U.S. 79 [91 L.Ed.2d 67, 106 S.Ct. 2411]	15
<i>Nichols v. United States</i> (1994) 511 U.S. 738 [128 L.Ed.2d 745, 114 S.Ct. 1921]	22
<i>North Carolina v. Pearce</i> (1969) 395 U.S. 711 [23 L.Ed.2d 656, 89 S.Ct. 2072]	12, 21
<i>Patterson v. New York</i> (1977) 432 U.S. 197 [53 L.Ed.2d 281, 97 S.Ct. 2319]	15
<i>People v. Calderon</i> (1994) 9 Cal.4th 69	15, 18, 19
<i>People v. Castellanos</i> (1990) 219 Cal.App.3d 1163	36
<i>People v. Collins</i> (1986) 42 Cal.3d 378	36
<i>People v. Equarte</i> (1986) 42 Cal.3d 456	6, 7, 9
<i>People v. Fields</i> (1996) 13 Cal.4th 289	4
<i>People v. Gates</i> (1987) 43 Cal.3d 1168	23
<i>People v. Gonzales</i> (1994) 29 Cal.App.4th 1684	36
<i>People v. Goodner</i> (1990) 226 Cal.App.3d 609	36



Table of Authorities, cont'd

<i>People v. Guerrero</i> (1988) 44 Cal.3d 343	27, 35
<i>People v. Hernandez</i> (1988) 46 Cal.3d 194	20, 21
<i>People v. Jackson</i> (1985) 37 Cal.3d 826	17, 21
<i>People v. Karis</i> (1988) 46 Cal.3d 612	23
<i>People v. Latimer</i> (1993) 5 Cal.4th 1203	4, 26
<i>People v. Martin</i> (1995) 32 Cal.App.4th 656	8, 20
<i>People v. McDowell</i> (1988) 46 Cal.3d 551	23
<i>People v. Melton</i> (1988) 44 Cal.3d 713	23
<i>People v. Morton</i> (1953) 41 Cal.2d 536	5, 15, 21, 22, 25, 26, 28, 33
<i>People v. Myers</i> (1993) 5 Cal.4th 1193	28
<i>People v. Reed</i> (1996) 13 Cal.4th 217	9, 35, 36
<i>People v. Sailor</i> (1985) 491 N.Y.S.2d 112	10, 12, 15, 17, 18
<i>People v. Santamaria</i> (1994) 8 Cal.4th 903	20, 30, 32
<i>People v. Saunders</i> (1993) 5 Cal.4th 580	4, 5, 24-28, 31, 33
<i>People v. Scott</i> (1994) 9 Cal.4th 331	36
<i>People v. Superior Court (Marks)</i> (1991) 1 Cal.4th 56	4, 16, 30, 31

Table of Authorities, cont'd

<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497	8
<i>People v. Tenner</i> (1993) 6 Cal.4th 559	15
<i>People v. Valladoli</i> (1996) 13 Cal.4th 590	5, 26, 28
<i>People v. Visciotti</i> (1992) 2 Cal.4th 1	22, 23
<i>People v. Welch</i> (1993) 5 Cal.4th 228	36
<i>People v. Wharton</i> (1991) 53 Cal.3d 522	23
<i>People v. Wiley</i> (1995) 9 Cal.4th 580	5, 15, 18, 19
<i>People v. Wims</i> (1995) 10 Cal.4th 293	20, 21
<i>Rummel v. Estelle</i> (1980) 445 U.S. 263 [63 L.Ed.2d 382, 100 S.Ct. 1133]	18, 22
<i>State v. Hennings</i> (1983) 670 P.2d 256 [100 Wash.2d 379]	10, 12
<i>Swisher v. Brady</i> (1978) 438 U.S. 204 [57 L.Ed.2d 705, 98 S.Ct. 2699]	27
<i>Teague v. Lane</i> (1989) 489 U.S. 288 [103 L.Ed.2d 334, 109 S.Ct. 1060]	36
<i>United States v. DiFrancesco</i> (1980) 449 U.S. 117 [66 L.Ed.2d 328, 101 S.Ct. 426]	12, 31-33

Table of Authorities, cont'd

Constitutional Provisions

Cal. Const., art. I, § 15 24

Statutes

18 U.S.C. § 3576 32

21 U.S.C. § 848 15, 24

Evid. Code, § 1200 35

Evid. Code, § 1291 35

Pen. Code, § 667 6-10, 20, 21

Pen. Code, § 1170.12 20, 21

Pen. Code, § 1192.7 5, 6, 9, 27, 29

Pen. Code, § 1385 8, 9

Court Rules

Cal. Rules of Court, rule 405 8

Other Authorities

Comprehensive Drug Abuse Prevention and Control Act of 1970 15, 24

Organized Crime Control Act of 1970 32

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S055881

v.

ANGEL JAIME MONGE,

Defendant and Appellant.

STATEMENT OF THE CASE

This is a second-strike case filed under the Three Strikes Law (see Pen. Code,<sup>1/</sup> §§ 667, subds. (b) through (i) [legislative version], 1170.12 [voter's initiative]), whereby appellant was sentenced to state prison for 11 years.

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged with adult using a minor in violation of Health and Safety Code section 11361, subdivision (a), (count I), sale or transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a), (count II), and possession of marijuana for sale in violation of Health and Safety Code section 11359 (count III). As to all counts, it was further alleged appellant suffered a prior serious or violent felony conviction within the meaning of the Three Strikes Law, and a prior prison term within the meaning

1. All further statutory references are to the Penal Code, unless otherwise indicated.



of subdivision (b) of section 667.5. Appellant pled not guilty and denied all special allegations. (CT 14-17, 20, 22, 33.)

Trial was by jury. The jury found appellant guilty as charged. Following a court trial on the prior, the court found the prior true, and sentenced appellant to state prison for 11 years, less 207 presentence custody credit days, as follows: the middle term of 5 years on count I, doubled to 10 years under the Three Strikes Law, plus 1 year under subdivision (b) of section 667.5. (CT 78-80, 82, 87-88.)

Appellant filed a notice of appeal from the judgment of conviction. (CT 89-90.) In an unpublished opinion, the California Court of Appeal affirmed the judgment of conviction, but reversed on insufficiency grounds the trial court's true finding as to the "strike" allegation (a 1992 assault conviction). The appellate court raised the insufficiency issue on its own motion, pursuant to which the parties filed supplemental letter briefs. The appellate court found "double jeopardy" barred respondent's request that this case be remanded for relitigation of the "strike" allegation.

#### ISSUES PRESENTED

1. Whether remand for a truthfulness proceeding as to a prior felony conviction violates double jeopardy principles.
2. Assuming no double jeopardy bar to remand, whether *People v. Reed* (1996) 13 Cal.4th 217, applies on remand.

#### STATEMENT OF FACTS

At about 4 p.m. on January 25, 1995, undercover officers from the Pomona Police Department driving an unmarked vehicle saw

appellant and a male juvenile (about 12 years old) standing in a rear alley near a carport area at 990 West Ninth Street in Pomona. The minor motioned for the officers to come in his direction. They complied. The officers rolled down their window, then asked where they could buy marijuana. Appellant subsequently gave the minor several "plastic baggies," and the minor sold the baggies to the officers for two marked \$10 bills. The officers drove away, then reported appellant and the minor's description to other officers. Those officers arrested appellant and the minor. Appellant had the marked \$10 bills on his person when he was searched incident to his arrest. (RT 61-77, 89-90.)

## ARGUMENT

### I

#### ALLOWING RELITIGATION OF A PRIOR FELONY CONVICTION WOULD NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to California by way of incorporation into the Due Process Clause of the Fourteenth Amendment (*Benton v. Maryland* (1969) 395 U.S. 784, 794 [23 L.Ed.2d 707, 89 S.Ct. 2056]; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71, fn. 13), provides, "nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb[.]" (*People v. Fields* (1996) 13 Cal.4th 289, 297.) "Protection against double jeopardy is also embodied in article I, section 15 of the California Constitution, which declares that '[p]ersons may not twice be put in jeopardy for the same offense.'" (*Id.*, at pp. 297-298.) "[F]ederal law sets the minimum standards of double jeopardy protection. Under California law, in some instances an accused may be entitled to greater double jeopardy protection than that afforded under the federal Constitution." (*Id.*, at p. 302 [citations omitted].) However, in the context of a truthfulness proceeding as to a prior conviction allegation, this Court has already concluded if the Double Jeopardy Clause of the federal Constitution is not implicated, neither is the parallel provision in the California Constitution. (See *People v. Saunders* (1993) 5 Cal.4th 580, 596; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1213 [discussing stare decisis].)

This Court is now asked to decide whether double jeopardy principles bar respondent from relitigating the truthfulness of a prior

felony conviction (in this case, alleged under the Three Strikes Law).<sup>2/</sup> The "strike" allegation (a 1992 assault conviction) was found true by the court in a bifurcated proceeding, but reversed on appeal when the Court of Appeal (after *sua sponte* ordering further briefing) concluded respondent should have proved appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or personally used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 as to appellant's prior assault.

For reasons explained below, respondent submits relitigating the truthfulness of a prior felony conviction allegation would not violate double jeopardy because this allegation is not an "offense" within the meaning of double jeopardy. Further, this Court's decision in *Morton* is sound, and governs here. (*People v. Morton, supra*, 41 Cal.2d at pp. 542, 544-545 [upon reversal of a prior conviction finding due to insufficient evidence, if the defect in proof is capable of correction on retrial, the proper remedy is a limited retrial on the prior conviction allegation] [*Morton* did not address the double jeopardy implications (if

---

2. See *People v. Valladoli* (1996) 13 Cal.4th 590, 608 ["Assuming, without deciding, double jeopardy principles apply to allegations of prior convictions"], noting *People v. Saunders, supra*, 5 Cal.4th at p. 593 ["We assume, without deciding, that double jeopardy principles apply to allegations of prior convictions"]; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8 ["We need not, and do not, decide whether a contrary holding that the evidence was insufficient would necessitate striking the enhancement or, instead, remanding the case to the trial court for a redetermination of whether the charges were separately brought"], citing *Caspari v. Bohlen* (1994) 510 U.S. 383, 392-397 [127 L.Ed.2d 236, 114 S.Ct. 948] [discussing, but not deciding, whether the federal double jeopardy clause applies to noncapital sentencing], and *People v. Morton* (1953) 41 Cal.2d 536, 541-545.



involved a remand for a retrial. *Moser* involved an appeal of a guilty plea entered following a misadvisement concerning consequences of the plea, and the court remanded for a hearing (not a trial) on the issue of prejudice. The decision in *Goodner* did not remand for a retrial but simply affirmed the judgment. The only remand that occurred in that defendant's case occurred in an earlier appellate decision that remanded for further proceedings following a reversal, not of a true finding on a prior conviction allegation based on insufficiency of evidence, but of *pretrial* orders *striking* prior serious felony *allegations*.

Respondent further claims that a remand for a retrial on the prior conviction allegation would not violate double jeopardy principles. We disagree. The double jeopardy clauses bar a retrial where a true finding on a prior conviction allegation is reversed based on insufficiency of the evidence. (*People v. Goodner* (1990) 226 Cal.App.3d 609, 613; *People v. Hockersmith* (1990) 217 Cal.App.3d 968, 972;<sup>8</sup> *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1302-1309; *People v. Jones* (1988) 203 Cal.App.3d 456, 460;<sup>9</sup> see also *People v. Saunders* (1993) 5 Cal.4th 580, 583, where the Supreme Court stated, "We assume, without deciding, that double jeopardy principles apply to allegations of prior convictions.")<sup>10</sup>

Respondent's reliance upon *People v. Saunders*, *supra*, and *People v. Torres* (1996) 45 Cal.App.4th 640, is misplaced. Again, neither involved a remand for a retrial where the evidence mustered by the People and submitted at a previous trial was

---

<sup>8</sup> Disapproved on another point in *People v. Saunders* (1993) 5 Cal.4th 580, 597, fn. 9.

<sup>9</sup> Disapproved on another point in *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn. 2.

<sup>10</sup> The issue of whether the double jeopardy clauses bar a retrial where a true finding on a Penal Code section 667, subdivision (a) enhancement allegation is reversed based on insufficiency of the evidence is presently before our Supreme Court in *People v. Hernandez* (S047306).

*insufficient*. Indeed, *Saunders*, as noted previously, *assumed* double jeopardy principles applied to prior conviction allegations. It is true that the case in *Saunders* was remanded for trial on a prior conviction allegation. However, trial proceedings on the prior conviction allegation in that case had been bifurcated and the jury had been discharged *before any trial on the prior conviction allegation had occurred*. Similarly, in *Torres*, appellant entered a plea bargain to a substantive offense, and the Three Strikes prior conviction allegation remained unresolved since appellant had not admitted it and the allegation *had never been tried*. *Torres* remanded for trial or other disposition of the allegation.

Since the trial court in the present case imposed sentence pursuant to a sentencing scheme (*People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458; *People v. Savala* (1983) 147 Cal.App.3d 63, 66-70) in which, even absent application of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), sentencing discretion remains, we will vacate appellant's entire sentence and remand his case for resentencing only. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.)<sup>11</sup>

#### DISPOSITION

We reverse the finding that appellant suffered a July 2, 1992, felonious assault conviction in case No. KA013241 within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), vacate his sentence, and remand the matter for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

---

<sup>11</sup> We leave undisturbed the true finding as to the Penal Code section 667.5, subdivision (b) enhancement allegation.

No. 97-6146

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANGEL JAIME MONGE, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, F. MITCHELL, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013;

I served one copy of the BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above-entitled case on each of the following person(s):

Cliff Gardner  
Gardner & Derham  
Ghirardelli Square  
900 North Point  
San Francisco, CA 94109

Jeffrey E. Thoma  
Mendocino County Public  
Defender  
3283 Ramos Circle  
Sacramento, CA 95827

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on DEC 17 1997, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served.

I declare under penalty of perjury that the foregoing is true and correct.

DEC 17 1997

Executed on \_\_\_\_\_, at Los Angeles, California.

Declarant

F. MITCHELL



**ORIGINAL**

Supreme Court, U. S.

**FILED**

**DEC 22 1997**

CLERK

No. 97 - 6146

**IN THE SUPREME COURT OF THE  
UNITED STATES**

October Term, 1996

---

---

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

---

**REPLY TO RESPONDENT'S BRIEF IN  
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

---

---

CLIFF GARDNER  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109

ATTORNEY FOR PETITIONER

**RECEIVED**

**DEC 22 1997**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

7 PP

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 1

I. IN ORDER TO RESOLVE A STARK SPLIT OF AUTHORITY IN THE  
LOWER COURTS OVER WHETHER DOUBLE JEOPARDY APPLIES TO  
TRIAL LIKE BUT NON-CAPITAL ENHANCEMENTS, CERTIORARI IS  
APPROPRIATE ..... 1

TABLE OF AUTHORITIES

Caspari v. Bohlen, 510 U.S. 383 (1994) ..... 2

Hunt v. New York, 112 S.Ct. 432 (1991) ..... 3

Lockhart v. Nelson, 488 U.S. 33 (1988) ..... 2

Spencer v. Georgia, 500 U.S. 960 (1991). ..... 1

Teague v. Lane, 489 U.S. 288 (1989) ..... 1



## INTRODUCTION

Pursuant to Rule 15, petitioner Angel Monge hereby submits this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

## ARGUMENT

- I. IN ORDER TO RESOLVE A STARK SPLIT OF AUTHORITY IN THE LOWER COURTS OVER WHETHER DOUBLE JEOPARDY APPLIES TO TRIAL LIKE BUT NON-CAPITAL ENHANCEMENTS, CERTIORARI IS APPROPRIATE.

Respondent makes two principal points in its Brief in Opposition to Petition for Writ of Certiorari. First, respondent correctly notes that because of the new rule bar of Teague v. Lane, 489 U.S. 288 (1989), the question squarely presented in this case cannot be resolved in federal habeas proceedings. (Brief in Opposition at 4-5, 6.)

As Justice Kennedy has noted, this point actually counsels in favor of a grant of certiorari. When resolution of an important question in federal court is barred by the new rule doctrine of Teague v. Lane, 489 U.S. 288 -- as respondent concedes here -- it is appropriate and necessary to grant certiorari in a case presenting that issue on direct review. Spencer v. Georgia, 500 U.S. 960, 961 (1991). Respondent's observation that the state court's resolution of this case "will not create any problem on federal habeas corpus" ignores this basic point.

Alternatively, respondent discusses the merits of the issue, concluding that the decision reached by the lower court plurality "passes constitutional scrutiny by this Court." (Brief in Opposition at 7-14.) Respondent's zeal to discuss the merits of the Double Jeopardy issue is misplaced.

Respondent does not dispute that this Court has repeatedly noted that the constitutional question presented in this case remains unresolved. See, e.g., Caspari v. Bohlen, 510 U.S. 383, 397 (1994); Lockhart v. Nelson, 488 U.S. 33, 37-38, n.6 (1988). Respondent does not dispute that, as this Court itself noted in Caspari, federal and state courts have "reached conflicting holdings on the issue." 510 U.S. at 395. Nor does respondent dispute that the Court has on one occasion already voted to grant certiorari to resolve this stark split, only to be unable to do so because of a Teague bar. Caspari v. Bohlen, 510 U.S. 383.

This is the perfect case to resolve the split of authority on this issue. The case comes to the Court on direct review. The issue was squarely presented to the state courts. Both the plurality and the dissenting opinions below reflect the stark split of authority throughout the country as to whether Double Jeopardy may apply in the context of formal trials on non-

capital enhancements. Moreover, the issue itself is a recurring one which presents itself in every jurisdiction in the country.<sup>1</sup>

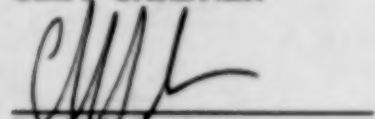
The question of whether Double Jeopardy permits the state repeated chances to prove a non-capital enhancement should not depend on the fortuity of where the case is tried.

Certiorari is appropriate to resolve this issue once and for all. See Hunt v. New York, \_\_\_ U.S. \_\_\_, 112 S.Ct. 432 (1991).

DATED: 12/19/97

Respectfully submitted,

GARDNER & DERHAM  
CLIFF GARDNER



By Cliff Gardner  
Attorney for Petitioner

<sup>1</sup> To its credit, respondent recognizes that the sufficiency issue was fully briefed and properly presented in the state court of appeal, albeit by way of a request for briefing by the state appellate court. Brief in Opposition at 3. Indeed, respondent attaches a copy of the brief filed on this issue with the state court of appeal. Brief in Opposition, Appendix C.

In that brief, respondent conceded that as to the prior conviction alleged as the basis for the enhancement, "there is nothing in the record which proves appellant personally inflicted great bodily injury . . . and or used a deadly or dangerous weapon . . . ." Brief in Opposition, Appendix C at 2. Given this concession, both the state supreme court and the state court of appeal agreed that under state law, the state had presented insufficient evidence to prove the enhancement. People v. Monge, Slip. Op. at 3-4; Brief in Opposition, Appendix D at 4.

CERTIFICATE OF SERVICE

I, Suzanne Ryan am over 18 years of age. My business address is Ghirardelli Square, Suite 220, 900 North Point, San Francisco, California, 94109. I am not a party to this action.

On December 19, 1997, I served the within

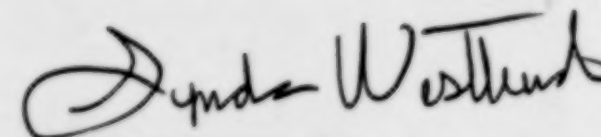
**REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS**

upon the party named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Carl Henry, Esq.  
Deputy Attorney General  
Office of the Attorney General  
300 South Spring Street  
North Tower - 5th Floor  
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true.

Executed on December 19, 1997, in San Francisco, California.



Linda Westlund



**ORIGINAL**

No. 97-6146

**ORIGINAL**

**MOTION FILED** IN THE SUPREME COURT OF THE

**OCT 22 1997**

UNITED STATES

October Term, 1996

---

---

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

---

MOTION FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF CALIFORNIA

---

---

JEFFREY E. THOMA

Mendocino County Public Defender

Member, California Public Defenders Association

Board of Directors and Amicus Committee

3273 Ramos Circle

Sacramento, CA 95827

(916) 362-1686 (CPDA)

199 South School Street

Ukiah, CA 95482

(707) 463-5433 (Mendocino County Public Defender)

Amicus Attorney on behalf of Petitioner  
Angel J. Monge

**RECEIVED**

**OCT 24 1997**

THE CLERK  
SUPREME COURT, U.S.

8 pp

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1996

---

ANGEL J. MONGE,  
Petitioner,  
vs.  
PEOPLE OF THE STATE OF CALIFORNIA,  
Respondent.

---

MOTION FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF CALIFORNIA

---

The California Public Defenders Association respectfully moves for leave to file this amicus curiae brief in support of petitioner's prayer that a Writ of Certiorari issue to review the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997.

Pursuant to Rule 37, the California Public Defenders Association respectfully moves for leave to file, and if allowed, hereby respectfully submits, this amicus curiae brief, in support of petitioner's prayer that a Writ of Certiorari issue to review the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997, and in favor of this Honorable Court reversing that decision. Petitioner consents to the filing of this amicus curiae brief, and respondent has refused their consent.

The California Public Defenders Association (hereafter CPDA) is the statewide association of public defenders. As such, members of this association are primary trial counsel in the State of California for criminal defendants who are unable to afford counsel. The Association is concerned with issues affecting criminal defendants and the administration of justice throughout California.

— The instant case raises a crucial question regarding whether the Double Jeopardy Clause applies to successive non-capital sentence enhancement trials that contain all the hallmarks of a trial on guilt or innocence. The members of CPDA represent the overwhelming majority of defendants accused of crimes in this state, as well as the majority of individuals in California situated similarly to petitioner herein. Thus, this organization has a vital and continuing interest in this issue being resolved, above and beyond the singular interest of petitioner herein. Because so many clients of this organization's members are affected by any decision on this issue, CPDA believes it has a sufficient interest and good reason to present this amicus brief.

Pursuant to Rule 37.6 of the rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and that no person, other than amici and their members, made a monetary contribution to the preparation or submission of this brief.



**THERE SHOULD BE A UNIFORM RULE THROUGHOUT THE COUNTRY AS TO WHETHER THE FEDERAL DOUBLE JEOPARDY CLAUSE APPLIES TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT TRIALS THAT CONTAIN ALL THE HALLMARKS OF A TRIAL ON GUILT OR INNOCENCE**

The highest courts of Colorado, Texas, and Washington have all determined that Double Jeopardy applies to habitual offender schemes, so long as they have all the characteristics of a trial on the question of guilt or innocence. See *People v. Quintana*, 634 P.2d 413, 417-418 Colo. 1981); *Cooper v. State*, 631 S.W. 508, 514 (Tex. 1982); *State v. Hennings*, 670 P.2d 256, 257-262 (Wash. 1983). Prior to the new rule doctrine of *Teague-v. Lane*, 489 U.S. 288 (1989), as applied in *Caspari v. Bohlen*, 510 U.S. 383 (1994); which now precludes federal courts from addressing this issue, several circuit courts had reached this same result. See, e.g., *Durosko v. Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1930; *Nelson v. Lockhart*, 828 F.2d 446, 449-451 and n.7 (8th Cir. 1987), *overruled on other grounds*, *Lockhart v. Nelson* 488 U.S. 33; *Briggs v. Procunier*, 764 F.2d 368, 372-373 (5th Cir. 1982); *French v. Estelle*, 692 F.2d 1021, 1023 (5th Cir. 1982), *cert. denied*, 461 U.S. 937.

Now the California Supreme Court in the instant case has reached the opposite result, denying the benefit of the Double Jeopardy Clause to defendants in these circumstances. There are a vast number of defendants situated in the

same circumstances as petitioner herein, who will also be affected by the ultimate decision of the courts on this issue. This Honorable Court has never decided this issue. See, e.g., *Lockhart v. Nelson*, 488 U.S. 33 (1988); *Caspari v. Bolden*, *supra*.

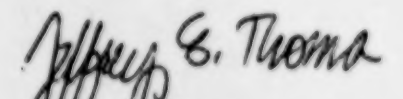
On behalf of the members of CPDA, and all of their clients who are similarly situated, we ask this Honorable Court to grant certiorari to resolve the split of authority, putting this divisive issue to rest for all this nation's citizens. The question of whether the federal Double Jeopardy Clause applies to successive non-capital enhancements which have all the hallmarks of a trial should depend upon what the law is, not upon where the case happens to be tried.

**CONCLUSION**

For all the foregoing reasons, the California Public Defenders Association believes this Petition for Writ of Certiorari should be granted.

DATED: October 22, 1997

Respectfully submitted,

  
Jeffrey E. Thoma

Member, CPDA Board of Directors  
Member, CPDA Amicus Committee

CLIFFORD GARDNER  
ROBERT DERHAM

GARDNER & DERHAM  
ATTORNEYS AT LAW  
BY BARRY J. BOLANDER  
DONALD W. BRYANT  
SAN FRANCISCO, CA 94108  
TELEPHONE 398-1848  
FAX 398-1849

PETER BOLE  
DEANNE NELSON

October 21, 1997


Jeff Thoma, Esq.  
Hendecine County Public Defender  
199 South School Street  
Ukiah, CA 95482

Re: Monga v. California, Case No. 97-6146

Dear Mr. Thoma:

This letter will confirm our recent conversation. On behalf of petitioner I hereby consent to your filing of an amicus brief in support of petitioner's Petition for Writ of Certiorari in the above case on behalf of the California Public Defender's Association.

Sincerely,

  
Cliff Gardner  
for GARDNER & DERHAM

cc: Office of the Attorney General

same circumstances as petitioner herein, who will also be affected by the ultimate decision of the courts on this issue. This Honorable Court has never decided this issue. See, e.g., *Lockhart v. Nelson*, 488 U.S. 33 (1988); *Caspari v. Bolden*, *supra*.

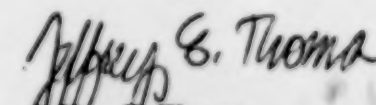
On behalf of the members of CPDA, and all of their clients who are similarly situated, we ask this Honorable Court to grant certiorari to resolve the split of authority, putting this divisive issue to rest for all this nation's citizens. The question of whether the federal Double Jeopardy Clause applies to successive non-capital enhancements which have all the hallmarks of a trial should depend upon what the law is, not upon where the case happens to be tried.

#### CONCLUSION

For all the foregoing reasons, the California Public Defenders Association believes this Petition for Writ of Certiorari should be granted.

DATED: October 22, 1997

Respectfully submitted,

  
Jeffrey E. Thoma  
Member, CPDA Board of Directors  
Member, CPDA Amicus Committee



**CERTIFICATE OF SERVICE**

I, Mariea Kubanis, am over 18 years of age. My business address is 199 So. School Street, Ukiah, California 95482. I am not a party to this action.

**AMICUS FOR WRIT OF CERTIORARI**

upon the parties named below by depositing a true copy in a United States mailbox in Ukiah, California, in a sealed envelope, postage prepaid, and addressed as follows:

Office of the Attorney General  
300 S. Spring Street  
Los Angeles, CA 90013

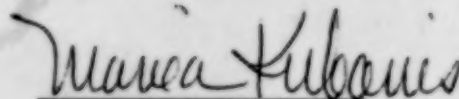
California Appellate Project  
611 Wilshire Boulevard  
2<sup>nd</sup> Floor  
Los Angeles, CA 90017

Angel Jaime Monge  
H-41271  
Pleasant Valley State Prison  
P.O. box 8500  
Coalinga, CA 93210

Cliff Gardner  
Attorney at Law  
Ghirardelli Square  
800 North Point  
San Francisco, CA 94109

I declare under penalty of perjury that the foregoing is true.

Executed on October 22, 1997, in Ukiah, California.

  
\_\_\_\_\_  
Mariea Kubanis

**RECEIVED**

**OCT 24 1997**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

6

Supreme Court, U.S.

FILED

FEB 10 1998

OFFICE OF THE CLERK

No. 97-6146

In The  
**Supreme Court of the United States**  
October Term, 1997

ANGEL J. MONGE,

*Petitioner,*

vs.

CALIFORNIA,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of The State Of California

JOINT APPENDIX

CLIFF GARDNER\*  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109  
Tel: (415) 922-9404  
*Counsel for Petitioner*  
*\*Counsel of Record*

CARL HENRY\*  
Office of the Attorney  
General  
300 South Spring St.  
Los Angeles, CA 90013  
Tel: (213) 897-2273  
*Counsel for Respondent*

**Petition For Certiorari Filed September 29, 1997**  
**Certiorari Granted January 16, 1998**

1341212



## TABLE OF CONTENTS

Docket Entries.....	1
People's Exhibit 1 (filed June 12, 1995).....	3
Minute Order of June 12, 1995.....	7
Partial Reporter's Transcript of June 12, 1995.....	9
Letter of June 7, 1996 from California Court of Appeal.....	27
Brief of Respondent in the California Court of Appeal (dated June 17, 1996) .....	30
Opinion of the California Court of Appeal (filed July 25, 1996) .....	40
Opinion of the California Supreme Court (filed August 27, 1997) .....	49
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, January 16, 1998 .....	132

**DOCKET ENTRIES**

09/03/96	PETITION FOR REVIEW FILED RESP., THE PEOPLE - REC.REQ/JAMES -
09/06/96	RECEIVED CA RECORD IN B094905 - 1 DOGHOUSE
09/23/96	ANSWER TO PETITION FOR REVIEW FILED APLNT., ANGEL J. MONGE
10/30/96	PETITION GRANTED VOTES: GEO. CJ., KEN, BAX, WER & BRN, JJ.
10/30/96	RECORD SENT TO COURT C/A RECORD B094905: C-1, R-1, 2, 3, 4, 7, 8 & MISC DOCUMENTS
12/16/96	COUNSEL APPOINTMENT ORDER FILED CLIFFORD GARDNER FOR APPELLANT ANGEL JAIME MONGE
12/24/96	APPLICATION FOR EXTENSION OF TIME FILED BY RESP (THE PEOPLE) REQUEST TO & INCLUDING JANUARY 23, 1997 TO FILE OPENING BRIEF ON THE MERITS. (FAXED . . . NAT) OK TO GRANT, ORD BNG PREPRD
01/06/97	APPLICATION FOR EXTENSION OF TIME GRANTED TO & INCLUDING JANUARY 23, 1997 TO SERVE & FILE RESP'S OPENING BRIEF ON THE MERITS
01/23/97	BRIEF ON THE MERITS FILED RESP (THE PEOPLE).
02/19/97	ANSWER BRIEF ON THE MERITS FILED BY APPLT MONGE
02/27/97	APPLICATION FOR EXTENSION OF TIME FILED BY RESP, TO FILE REPLY BRIEF. . . . NAT



03/07/97 APPLICATION FOR EXTENSION OF TIME  
GRANTED TO & INCLUDING MARCH 10,  
1997 TO SERVE & FILE RESP'S REPLY  
BRIEF ON THE MERITS.

03/10/97 REPLY BRIEF ON THE MERITS FILED  
RESPONDENT (THE PEOPLE).

04/02/97 COMPENSATION AWARDED COUNSEL

04/23/97 FILED LETTER DATED APRIL 21, 1997  
FROM APPELLANT RE INDIANA  
SUPREME COURT DECISION.

05/01/97 CASE ORDERED ON CALENDAR: 6-3-97,  
9AM, C/A 2-6 VENTURA

05/09/97 FILED LETTER FROM: AG DATED 5-9-97.

06/03/97 CAUSE CALLED AND ARGUED

06/03/97 SUBMITTED

08/27/97 OPINION FILED REVERSED. OPINION BY  
CHI, J. WE CONCUR: GEO, CJ BAX, J.  
CONCURRING OPIN BY BRN, J. DISSENT-  
ING OPIN BY WER, J. WE CONCUR: MOS,  
KEN, JJ

10/01/97 REMITTITUR ISSUED

10/06/97 RECEIVED NOTICE FROM USSC RE FIL-  
ING OF PETN FOR CERT ON SEPT 29,  
1997. #97-6146.

10/10/97 RECEIVED DOCUMENT ENTITLED:  
RECEIPT FOR REMITTITUR.

12/02/97 COMPENSATION AWARDED COUNSEL

---



DEPARTMENT OF CORRECTIONS

Parole and Community Services Division  
21015 Pathfinder Road Suite 100  
Diamond Bar, CA 91765  
(909) 468-2399

Date: 2-17-95

Office of the District Attorney

County of: Los Angeles

RE: Margee Angel

Our CDC#: H41277

Your# \_\_\_\_\_

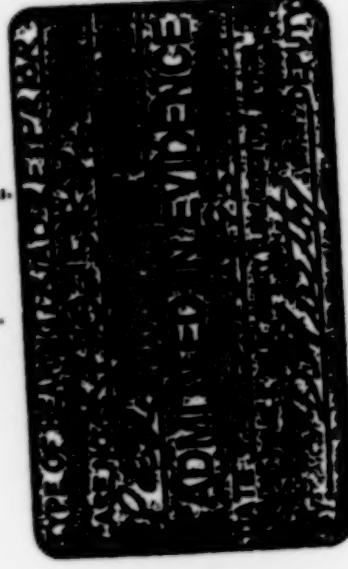
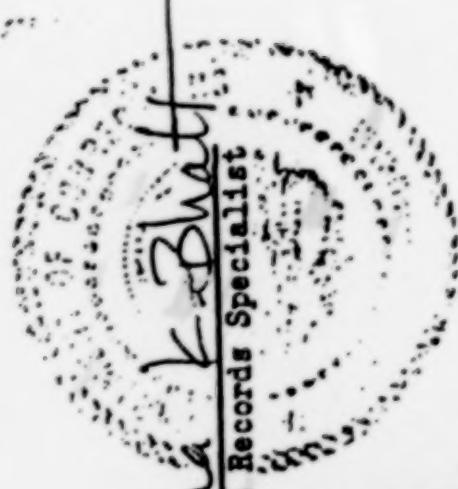
Dear Sir,

This is to certify that the Director of the Department of Corrections, is the official legal Custodian of Records for prisoners committed to the California Department of Corrections. The Director of Corrections has authorized the undersigned as Records Specialist of the Parole & Community Services Division to certify in his behalf the criminal records of persons who have served sentences in California State Prisons; including the certifications required under Section 969b of the California Penal Code.

I further certify that the copies of the Abstract of Judgement(s), Fingerprint card(s), Chronological Movement History, and Photograph attached are true and correct copies of those in my custody as required by law.

Sincerely,

Shobhana K. Bhatt  
Correctional Case Records Specialist



EX 1





ABSTRACT OF JUDGMENT - PRISON COMM. JUL 8 1992 FORM DSL 290.1  
SINGLE OR CONCURRENT COUNT FORM

(Not to be used for Multiple Count Convictions nor Consecutive Sentences)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES  
COURT I.D. 1900002 BRANCH 3103868 at CASE NUMBER KA 013241  
PEOPLE OF THE STATE OF CALIFORNIA VERSUS  
DEFENDANT: 01 JAIMES, ANGEL MONGE  
AKA:  
COMMITMENT TO STATE PRISON  
ABSTRACT OF JUDGMENT  
DATE OF HEARING (MO DAY YR) 07 02 92 DEPT. NO. EA F JUDGE J PIATT CLERK J PARKER  
REPORTER D PINEDA COUNSEL FOR PEOPLE I UHLER COUNSEL FOR DEFENDANT R WHITTENHILL DPD PROBATION NO. OR PROBATION OFFICER X-146589

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/INFRACTION):

COUNT	CODE	SECTION NUMBER	CRIME	DATE OF CONVICTION	CONVICTED BY	TIME IMPOSED
1	PC	245(a)(1)	ADW GBI	92 07 02 92	X L 2 0	YEARS MONTHS

ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC., or each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
							0

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHERS.

List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
						0

4. OTHER ORDERS:

a. TIME STAYED § 1170.1(b) (DOUBLE BASE LIMIT):

7. TOTAL TERM IMPOSED:

7. THIS SENTENCE IS TO RUN CONCURRENT WITH ANY PRIOR UNCOMPLETED SENTENCE(S):

8. EXECUTION OF SENTENCE IMPOSED:

A. ☒ AT INITIAL SENTENCING HEARING B. ☐ AT RESSENTENCING PURSUANT TO DECISION ON APPEAL C. ☐ AFTER REVOCATION OF PROBATION D. ☐ AT RESSENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170.6) E. ☐ OTHER

9. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR) 07 02 92 CREDIT FOR TIME SPENT IN CUSTODY 42 INCLUDING: ACTUAL LOCAL TIME 28 LOCAL CONDUCT CREDITS 14 STATE INSTITUTIONS ☐ DUN ☐ CDC

10. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

☒ FORTHWITH TO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:  
☐ AFTER 48 HOURS.  
☐ EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS

☐ CRIME INSTITUTION FOR WOMEN - FRONTIERA  
☐ CALIF. MEDICAL FACILITY - VACAVILLE  
☐ SAN QUENTIN

☐ DEUEL VOC. INST  
☐ CALIF. INSTITUTION FOR MEN - CHINO

I hereby certify the foregoing to be a correct abstract of the judgment made in this case.

DEPUTY'S SIGNATURE

*[Signature]*

CLERK OF THE COURT

7-6-92

This form is prescribed under Penal Code § 213.5 to satisfy the requirements of § 1213 for defendant's abstract of judgment. Abstracts may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT  
SINGLE OR CONCURRENT COUNT FORM  
(Not to be used for Multiple Count Convictions nor Consecutive Sentences)



STATE OF CALIFORNIA

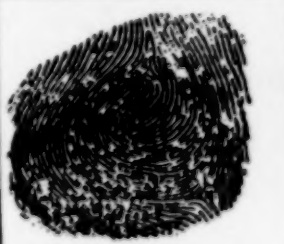




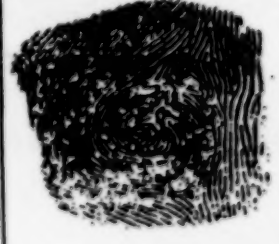




## FINGERPRINT CARD

NO. 86

NO. H-41271

NAME JAIMES, ANGEL MONGE CLASS           ALIAS            REF.           

Right Hand

6

Hair BLK

Weight 140

Eyes BRN

Age 32

Complexion OLIVE

Build SMALL

Height 65

Occupation CONST.

Rec'd at RCC-CIM

Date 7-21-92

County LACO

Nationality MEX

Offense KA013241 Ct. 1, ASLT W/DW(245(a))(1)PC

Term 2 YEARS

Race HISP

Marks, Scars, Tattoos (Location &amp; Brief Description — Scar Right Eye, Tattoo Eagle Right Forearm. NOTE: If numerous list those most prominent).

NONE

Signature

Right Thumb

Left Thumb

Left Hand

Right Hand

BEST AVAILABLE COPY

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES, EAST DISTRICT  
MINUTE ORDER

DATE: JUNE 12, 1995 DEPARTMENT EAST "B"  
JUDGE: SAM CIANCHETTI CLERK: D. PRESTBY  
BAILIFF: R. SMALE REPORTER: S. FOX, #4332

CASE: KA025876-01

Parties & Counsel checked, if present

PEOPLE OF THE STATE DDA: L.LARSON (X)  
OF CALIFORNIA A.BESTARD,987.2(X)

vs.

01 MONGE, ANGEL  
JAIME, Defendant (x)  
H11361(a) 01ct; H11360(a)  
01ct; H11359 01ct

X 1468589

---

NATURE OF PROCEEDINGS:TRIAL RE PRIOR/P&S  
REM 5-16-95

Matter is called for hearing.

People exhibit 1-department of corrections document is  
received in evidence.

Prior is found to be true.

Defendant makes motion for new trial. Angelo Marti,  
previously sworn, testifies for purposes of the motion.  
Gilda Reker is sworn and testifies for purposes of the  
motion. Motion is argued. Motion is denied.

Probation is denied. Defendant sentenced as follows:

As to count 1, defendant is sentenced to prison mid term  
of 5 years, which pursuant to penal code section 1170.12



a-d is doubled to the term of 10 years. As to count 2 the mid term of 3 years which is stayed until the successful completion of sentence re count 1, at which time the stay is permanent. As to count 3 the mid term of 2 years which is to run concurrent to sentences re counts 1 and 2. As to prior found to be true defendant is sentenced to term of 1 year which is to run consecutively to sentence re count one. Total prison term of 11 years.

Defendant is to be given credit for 207 days in custody - 138 actual days, and 69 days good time/work time.

Court advises defendant of his appeal and parole rights.

Notice of appeal is received.

REMANDED.

MINUTE ORDER      Minutes Entered:06-12-95

---

[187] POMONA; CALIFORNIA; MONDAY, JUNE 12, 1995

1:30 P.M.

DEPARTMENT EAST B HON. SAM CIANCHETTI,  
JUDGE

APPEARANCES:

(AS HERETOFORE NOTED.)

(SHARON BAKER FOX, CSR NO. 4332, OFFICIAL  
REPORTER.)

THE COURT: WE'LL CALL THE ANGEL  
MONGE MATTER. RECORD WILL REFLECT HE IS PRE-  
SENT IN COURT WITH COUNSEL, MR. BESTARD.

ALSO PRESENT IS OUR INTERPRETER, MR. RAV-  
ELO.

MR. RAVELO, I REMIND YOU, YOU ARE UNDER  
THE SAME OATH WHEN YOU FIRST STARTED INTER-  
PRETING IN THIS MATTER.

THE JURY HAS RETURNED A VERDICT OF  
GUILTY AS TO THE THREE COUNTS. IT'S MY UNDER-  
STANDING NOW, MR. BESTARD, THAT IT'S MR.  
MONGE'S DESIRE TO ADMIT THAT HE DID SUFFER  
THE PRIOR CONVICTION; IS THAT CORRECT?

MR. BESTARD: THAT'S CORRECT, YOUR  
HONOR.

THE COURT: MR. MONGE, YOU HAD PREVI-  
OUSLY BEEN ADVISED OF YOUR RIGHT TO A COURT  
TRIAL AFTER HAVING WAIVED THE JURY TRIAL ON

THE ISSUE OF WHETHER OR NOT YOUR PRIOR CONVICTION IS TRUE. IT'S MY UNDERSTANDING YOU WISH TO GIVE UP YOUR RIGHT TO A COURT TRIAL AT THIS TIME, YOU WISH TO ADMIT THAT PRIOR CONVICTION IS TRUE. AND YOU SHOULD UNDERSTAND IN SO DOING THAT THAT ADDS ONE YEAR TO ANY TERM THAT YOU MAY HAVE TO SERVE.

YOU UNDERSTAND EVERYTHING THAT I HAVE SAID, [188] SIR?

THE DEFENDANT: YES.

MR. LARSON: YOUR HONOR, IT'S ALSO ALLEGED THAT THIS IS A STRIKE PURSUANT TO 667(B) THROUGH (I).

THE COURT: ALL RIGHT.

WELL, DID WE - WE'RE OFF THE RECORD MOMENTARILY.

(OFF THE RECORD.)

THE COURT: LET'S GO BACK ON THE RECORD NOW. WE'LL AGAIN CALL THE ANGEL MONGE MATTER, AND THE RECORD WILL REFLECT HE IS PRESENT IN COURT WITH THE INTERPRETER.

MY - I GUESS - THE ISSUE BEFORE THE COURT NOW IS - IS - MY UNDERSTANDING IS WE'RE DISCUSSING THE QUESTION OF WHETHER OR NOT MR. MONGE IS TO ADMIT THE PRIOR. MY UNDERSTANDING, HE DOES WISH TO ADMIT THE PRIOR.

IS THAT CORRECT?

MR. BESTARD: NO, HE DOESN'T. HE WISHES THE COURT TO TRY THE PRIOR WITHOUT THE JURY.

THE COURT: IN SO DOING, I WISH MR. MONGE TO UNDERSTAND THAT THERE IS A POSSIBILITY UNDER THE CODE THAT IF IT IS DETERMINED THAT THE PRIOR FALLS WITHIN THE PROVISIONS OF PENAL CODE SECTION 1170.12(A) THROUGH (D). THAT THE COURT IS REQUIRED TO DOUBLE ANY SENTENCE THAT MR. MONGE WOULD HAVE TO SERVE IN THIS MATTER. AND, FURTHER, THAT HE WOULD ONLY RECEIVE, MY UNDERSTANDING, IS THIS CORRECT, MR. LARSON, HE WOULD ONLY RECEIVE 80 PERCENT [189] GOOD AND WORK TIME CREDITS ONCE HE - ONCE HE REACHES THE STATE PENITENTIARY; IS THAT RIGHT?

MR. LARSON: THAT'S CORRECT.

THE COURT: HE WOULD ONLY GET 20 PERCENT CREDITS AS OPPOSED TO 50 PERCENT CREDITS; IS THAT CORRECT? AND THE TERM WOULD BE DOUBLED.

MR. LARSON: AND PEOPLE WOULD ALSO MOVE TO ADD ANOTHER ALLEGATION THAT THIS PRIOR CONVICTION COMES UNDER 667(A), WHICH WOULD REQUIRE AN ADDITIONAL FIVE YEARS BE IMPOSED CONSECUTIVE TO ANY OTHER SENTENCE UNDER THE THREE STRIKES LAW.

THE COURT: WELL, MY UNDERSTANDING, MR. LARSON, IT DOES NOT QUALIFY AS A VIOLENT FELONY UNDER 667.5; IS THAT CORRECT?



MR. LARSON: THAT'S CORRECT. BUT WE CONTEND IT QUALIFIES AS A SERIOUS FELONY UNDER 1192.7. AND THERE IS A CASE ON POINT, PEOPLE VERSUS ARWOOD, A-R-W-O-O-D, AT 165 CAL.APP.3D, 167. AND THE COURT STATES THAT ASSAULT WITH A DEADLY WEAPON IS A SERIOUS FELONY IF THE DEFENDANT PERSONALLY USED THE DEADLY WEAPON AND IS NOT GUILTY IN A CAPACITY OF AIDING AND ABETTING. IN THE PRIOR CASE THAT THE DEFENDANT PLED GUILTY TO, KA012341, IT WAS ALLEGED IN COUNT 1 THAT HE COMMITTED A CRIME OF ASSAULT WITH A DEADLY WEAPON, TO WIT, A STICK UPON THE VICTIM OF MISS GARCIA. AND THERE WAS NO OTHER DEFENDANTS IN THAT CASE. AND, IN FACT, THE DEFENDANT PLED GUILTY TO IT, IN WHICH CASE HE PERSONALLY USED THE DEADLY WEAPON, A STICK UPON THE VICTIM IN THE CASE, WHICH WOULD MAKE IT A SERIOUS FELONY ACCORDING [190] TO 1192.7, ALSO PEOPLE VERSUS ARWOOD.

THE COURT: SO IF I UNDERSTAND YOU CORRECTLY, YOU'RE SAYING THAT, THAT THE CASE FALLS - THAT HE - THAT IT'S A SERIOUS FELONY WITHIN SECTION 667(A) AND YOU LOOKED 1192, THAT SUB-SECTION TO DETERMINE WHETHER OR NOT IT'S A SERIOUS FELONY; IS THAT CORRECT?

MR. LARSON: THAT IS CORRECT.

THE COURT: NOW, MY UNDERSTANDING, YOU DON'T DOUBLE THE TOTAL TERM, YOU JUST DOUBLE THE BASE TERM AND THEN IMPOSE THE

ENHANCEMENT ABOVE THE - THE PRIOR ENHANCEMENT OVER AND ABOVE THAT; IS THAT CORRECT?

MR. LARSON: YES, YOUR HONOR. SO YOU DOUBLE THE BASE TERM. BUT THEN ANY PRIOR CONVICTION HE SUFFERED UNDER 667(A) OR 667.5 WOULD NECESSARILY BE ADDED ON CONSECUTIVE TO THAT. THERE IS A RECENT CASE ON COMPUTATION.

THE COURT: MR. BESTARD, DO YOU HAVE ANY -

MR. BESTARD: IT'S THE CONTENTION OF THE DEFENSE THERE IS NO SERIOUS FELONY BECAUSE I THINK IN THE TRIAL WHICH WE'RE GOING TO PUT TO THE COURT THAT THE DEADLY WEAPON HERE WAS NOT REFUTABLY AT ALL A DEADLY WEAPON. IT WAS A STICK. ALTHOUGH HE MAY HAVE PLEADED TO THAT BEING A DEADLY WEAPON, I THINK WHEN YOU LOOK AT THE STRIKE ITSELF AND THE PRIOR COMMITMENT AND THE CRIME ITSELF, THAT THE STICK WOULD BE USED NOT ONLY AS A DEADLY WEAPON BUT ALSO AN INNOCUOUS OBJECT, THEREFORE, WE DON'T BELIEVE IT FALLS WITHIN THE -

THE COURT: WELL, I THINK THAT ISSUE HAS BEEN DETERMINED BY THE PLEADING AND THE PLEADING IN SUBSEQUENT [191] CASES, HASN'T IT?

MR. BESTARD: IT HAS BEEN, BUT WE'D LIKE THE COURT TO LOOK AT THAT TO SEE IF THAT IN FACT -

THE COURT: WELL, I DON'T THINK I CAN REWEIGH THE ISSUE.

MR. BESTARD: I BELIEVE THE COURT CAN FIND UNDER THE 245 THAT IT WASN'T A DEADLY WEAPON EVEN THOUGH HE WAS CONVICTED OF THAT, THAT IN THE SUBSTANCE OF THAT CASE IT WASN'T -

THE COURT: YOU WANT TO GIVE ME - I MEAN, LET'S PUT IT ON CONTEXT OF A ROBBERY. YOU MEAN I - I CAN - IF THERE IS AN ALLEGATION THAT HE TOOK MONEY BY FORCE AND FEAR AND HE PLEADS GUILTY TO THAT, I CAN THEN AT SOME SUBSEQUENT TIME LITIGATE THE ISSUE WHETHER OR NOT THERE WAS FORCE OR FEAR?

MR. BESTARD: NO, YOUR HONOR, WE'RE NOT LITIGATING FORCE AND FEAR. AND THIS IS DIFFERENT THAN A ROBBERY. HERE THE DEADLY WEAPON WAS ALLEGED TO BE A STICK. NOW, IF IT WAS A GUN OR CLUB OR KNIFE, I DON'T THINK I WOULD HAVE THAT ARGUMENT.

THE COURT: IT WAS ALLEGED A DEADLY WEAPON AND HE PLED GUILTY TO THAT.

MR. BESTARD: I'M SUBMITTING IT, YOUR HONOR.

THE COURT: I - WHAT I'M TRYING TO GET A HANDLE ON ARE THE PARAMETERS, THE SENTENCING PARAMETERS TO MR. MONGE.

PREVIOUSLY HE HAD BEEN TOLD, AS I RECALL - I DON'T SEE IT IN THE FILE. BUT MY RECOLLECTION IS THERE WAS A - MAYBE I'M CONFUSING THIS WITH ANOTHER CASE THAT WE [192] HAD.

I GUESS IT WAS THE OTHER CASE THAT WE HAD WHERE YOU HAD TO ADVISE HIM OF THE TOTAL CONSEQUENCES OF THE PLEA; IS THAT CORRECT?

MR. LARSON: THAT'S CORRECT, YOUR HONOR.

FOR WAIVING A JURY, I DON'T BELIEVE -

THE COURT: THAT'S RIGHT. MR. MONGE, HE HAD PREVIOUSLY WAIVED JURY THEN ON THE ISSUE OF THE PRIORS; IS THAT CORRECT?

MR. BESTARD: YES, YOUR HONOR.

MR. LARSON: YES.

THE COURT: ALL RIGHT.

I'VE - MY UNDERSTANDING IS THE MATTER IS TO BE SUBMITTED TO ME, IS IT, MR. BESTARD AND MR. LARSON? BASED ON THE - THE ONLY EVIDENCE TO BE CONSIDERED BY THE COURT IS THE CONVICTION WHICH THE COURT WILL TAKE JUDICIAL NOTICE OF IN CASE NUMBER SA013241.

IS THAT CORRECT?

MR. LARSON: YOUR HONOR, PEOPLE WOULD ALSO ASK THE COURT TO CONSIDER A PRIOR PACKAGE FROM THE DEPARTMENT OF CORRECTIONS WHICH - AND AN ABSTRACT OF JUDGMENT. MAY WE HAVE THIS MARKED AS COURT'S -



THE COURT: YES, IT WILL BE MARKED AND RECEIVED AS EXHIBIT - 1 COLLECTIVELY.

YOU HAVE A CHANCE TO SEE, MR. BESTARD?

MR. BESTARD: HE SHOWED IT TO ME AT THE BEGINNING OF TRIAL, YOUR HONOR.

THE COURT: ALL RIGHT.

[193] EXHIBIT 1 IS RECEIVED IN EVIDENCE AT THIS TIME.

ANY FURTHER EVIDENCE TO BE OFFERED BY EITHER SIDE?

MR. LARSON: NO, YOUR HONOR.

MR. BESTARD: YOUR HONOR, WE'RE OBJECTING. ALL THIS IS IS A PHOTOGRAPH OF MR. JAIME MONGE. THE FINGERPRINT, THERE IS NO FINGERPRINT EXPERT BEEN SUMMONED TO COMPARE HIS PRINTS WITH THAT OF THE DEPARTMENT OF CORRECTIONS FINGERPRINTING, AND FOR THAT REASON, WE BELIEVE THE PEOPLE HAVE FAILED TO PROVE THAT IS IN FACT MR. MONGE.

SUBMIT IT.

THE COURT: IT'S THE COURT VIEW THERE HAS BEEN PROOF SUBMITTED TO THE COURT BEYOND A REASONABLE DOUBT INDICATING MR. MONGE WAS IN FACT CONVICTED OF THE PRIOR FELONY AND, IN FACT, DID SERVE A TERM IN THE STATE PENITENTIARY FOR THAT FELONY. THE FELONY BEING PERSONAL USE OF A DEADLY WEAPON IN VIOLATION SECTION 245, 245(A)(1).

ALL RIGHT. I - MY UNDERSTANDING NOW, MR. BESTARD, IS THAT SUBJECT TO YOUR ARGUMENT FOR A MOTION ON THE NEW TRIAL, YOU WISH TO PROCEED WITH THE PROBATION AND SENTENCING HEARING AT THIS TIME?

MR. BESTARD: YES, YOUR HONOR. LIKE TO HAVE A MOTION - LIKE TO HAVE FIRST A MOTION FOR NEW TRIAL BE HEARD.

PEOPLE WANT NOTICE OF THAT, WE WOULD BE WILLING TO WAIVE NOTICE, WE CAN DO IT WITHIN THE NEXT FIVE DAYS, BY FRIDAY, IF THEY ARE WILLING.

\* \* \*

[238] MR. BESTARD: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

I HAVE READ THE PROBATION REPORT.

YOU WAIVE ARRAIGNMENT FOR JUDGMENT AND SENTENCE?

MR. BESTARD: YES, YOUR HONOR.

THE COURT: AND IT'S MY UNDERSTANDING THAT THIS REPORT WAS PREPARED FOR HEARING BACK IN FEBRUARY OF '95. AND I UNDERSTAND THAT ANY REQUEST FOR A MORE CURRENT REPORT IS WAIVED AT THIS TIME; IS THAT RIGHT?

MR. BESTARD: YES, YOUR HONOR.

THE COURT: IS THAT CORRECT, MR. MONGE, YOU WANT ME TO SENTENCE YOU TODAY

BASED ON THE PROBATION REPORT THAT'S ALREADY BEEN PREPARED? IS THAT RIGHT?

THE DEFENDANT: YES.

THE COURT: LESS THERE IS ANY DOUBT, THE ISSUE ON THE PRIOR THAT WAS SUBMITTED TO ME BASED UPON EVIDENCE CONTAINED IN COURT FILE KA013241, ALONG WITH THE EXHIBIT 1, WHICH IS THE - WHICH IS THE CORRECTION PACKAGE, THE COURT DOES FIND BEYOND A REASONABLE DOUBT THAT THE PRIOR CONVICTION IS TRUE.

ALL RIGHT. I HAVE REVIEWED THE PROBATION REPORT. YOU WAIVE ARRAIGNMENT FOR JUDGMENT, MR. BESTARD?

MR. BESTARD: YES, I HAVE.

THE COURT: ANY LEGAL CAUSE THAT WE HAVE? WE HAVE RESOLVED THE MOTION FOR NEW TRIAL.

MR. BESTARD: NO LEGAL CAUSE.

THE COURT: ALL RIGHT.

[239] IT'S THE COURT'S VIEW THAT THE - THAT GIVEN THE FACT THAT THE DEFENDANT HAD SUFFERED A PRIOR CONVICTION, HAD SERVED A TERM IN THE STATE PENITENTIARY, CONSIDERING ALSO THE FACT THAT - THAT HE WAS INVOLVED IN THIS ACTIVITY WITH A - WITH A MINOR OF - I BELIEVE THE MINOR WAS, WHAT, 12 OR 13 YEARS OF AGE? I FIND THAT - I FIND IT PARTICULARLY TROUBLESOME THAT THE - MR. MONGE WOULD UTILIZE THE

SERVICES OF A MINOR FOR PURPOSES OF ENGAGING IN SALES OF NARCOTICS. FOR THOSE REASONS, IT'S THE COURT'S VIEW THAT A STATE PRISON SENTENCE IS INDICATED.

I FEEL THE - THE REAL GRAVAMEN OF THIS OFFENSE IS SET FORTH IN COUNT 1. AS TO THAT OFFENSE, THERE BEING NO EVIDENCE OFFERED IN AGGREGATION OR IN MITIGATION, IT'S THE COURT'S VIEW THE APPROPRIATE TERM WOULD BE THE MIDDLE TERM OF FIVE YEARS. SO AS TO THAT TERM, PROBATION IS DENIED. IT WILL BE THE JUDGMENT OF THIS COURT THAT THE DEFENDANT SERVE A MIDDLE TERM OF FIVE YEARS. AND IN LIGHT OF THE APPLICATION OF THE LAW AS SET FORTH IN SECTION 1170.12 (A) THROUGH (D), THAT TERM IS ORDERED DOUBLED OR HE IS TO SERVE A TOTAL TERM OF TEN YEARS. AND - THAT'S AS TO COUNT 1.

WE'RE OFF THE RECORD MOMENTARILY.

(OFF THE RECORD.)

THE COURT: WE'RE BACK ON THE RECORD.

THE PRIOR WILL STAND AS CHARGED AND MOTION TO AMEND THE INFORMATION WITH RESPECT TO THE PRIOR IS [240] WITHDRAWN BY THE PEOPLE.

AND AS TO THE TERM OF TEN YEARS, THEN, I'M ADDING ONE ADDITIONAL YEAR FOR THE FACT THAT THE DEFENDANT SERVED OR WAS CONVICTED OF A PRIOR CONVICTION FOR ASSAULT WITH A DEADLY WEAPON, VIOLATION OF SECTION



245(A)(1), IN CASE NUMBER KA013241 AND DID, IN FACT, SERVE A TERM IN THE PENITENTIARY FOR THAT OFFENSE.

NOW, WITH RESPECT TO COUNTS 2 AND 3, IT'S THE - IT'S THE COURT'S VIEW THAT SECTION, CERTAINLY WITH RESPECT TO COUNT 2, THAT - THAT THE SECTION 654 WOULD BAR PUNISHMENT FOR THAT OFFENSE BY VIRTUE OF THE FACT THAT THE SALE - WE HAD ONE SALE THAT A MINOR WAS USED. THERE ARE NO ADDITIONAL SALES, AND THAT'S THE SAME SALES WHICH IS REFERENCED IN COUNT 2. SO AS TO THAT OFFENSE, THE DEFENDANT IS ORDERED TO SERVE THREE YEARS IN THE STATE PENITENTIARY, AND I'M GOING TO GRANT A - THAT'S THE MIDDLE TERM. AND I'M GOING TO GRANT A STAY OF EXECUTION UNTIL HE SERVES ALL OF THE TIME ORDERED IN COUNT 1. AND THEN AT THAT TIME, THE STAY OF EXECUTION, ONCE HE'S SERVED ALL THAT TIME, THEN THE STAY OF EXECUTION WILL BECOME PERMANENT.

IN COUNT 3, THE DEFENDANT IS ORDERED TO SERVE THE MIDDLE TERM OF TWO YEARS. AND IN LIGHT OF THE FACT THAT - IT'S THE COURT'S VIEW THAT GIVEN THE TOTAL CIRCUMSTANCES OF THE SALE IN THIS MATTER, IT'S THE COURT'S VIEW THAT THE TERM ORDERED IN COUNT 1 WOULD PROVIDE ADEQUATE PUNISHMENT FOR HIS INVOLVEMENT - TOTAL INVOLVEMENT, AND FOR THAT REASON I'M GOING TO ORDER THE TIME IN COUNT 3 TO RUN CONCURRENT WITH THE TIME ORDERED IN [241] COUNTS 1 AND 2.

NOW, THE DEFENDANT HAS BEEN IN CONTINUOUS CUSTODY SINCE THE DATE OF HIS ARREST.

IS THAT CORRECT?

MR. BESTARD: YES, YOUR HONOR. TODAY IS THE 163RD DAY OF THE YEAR, AND HE WAS ARRESTED ON JANUARY 12TH. HE SHOULD HAVE CREDIT FOR 11- - STRIKE THAT. 150 DAYS ACTUAL.

THE COURT: WHAT?

MR. BESTARD: 150 DAYS ACTUAL.

THE COURT: HE'S TO RECEIVE CREDIT FOR THAT TIME.

MR. LARSON: HE WAS ARRESTED ON THE 25TH.

MR. BESTARD: I'M SORRY, YOUR HONOR. HE WAS ARRESTED ON THE 25TH. THEN MY MATH IS A LITTLE LESS. 130 DAYS ACTUAL AND ADDITIONAL 69 DAYS.

THE COURT: 65 DAYS OF GOOD/WORK TIME CREDIT?

MR. BESTARD: WELL, ONE AND A HALF OF 138.

THE COURT: I THOUGHT YOU SAID 130.

MR. LARSON: ISN'T ACTUAL DAYS 98? WE'RE - OKAY.

MR. BESTARD: NO, 27 FROM 163. TODAY IS 163.

MR. LARSON: 163.

OKAY.

THE COURT: SO THAT'S - AND A TOTAL OF 69 DAYS GOOD AND WORK TIME CREDITS?

MR. BESTARD: YES, YOUR HONOR.

THE COURT: TOTAL PRE-SENTENCE CREDITS WILL BE 207 DAYS.

LET'S REITERATE AGAIN FOR BENEFIT OF THE [242] CLERK. THE TOTAL TERM HE'S RECEIVING AS TO COUNT 1 IS TEN YEARS ON THE BASIC CHARGE. THAT'S FIVE YEARS WHICH IS THE MIDDLE TERM, WHICH IS DOUBLED, FOR A TERM OF TEN YEARS. AND TO THAT TERM, I'M ADDING ONE ADDITIONAL YEAR FOR THE PRIOR. THAT'S THE TOTAL TERM OF 11 YEARS. AND HE'S TO RECEIVE A THREE-YEAR TERM AS TO COUNT 2, BUT BECAUSE OF THE APPLICATION OF SECTION 654 OF THE PENAL CODE, I'M GOING TO GRANT A STAY OF EXECUTION AS TO THE TIME ORDERED IN COUNT 2. THAT STAY WILL BECOME PERMANENT ONCE ALL OF THE TIME IN COUNT 1 IS ORDERED. AND THEN THE TIME ORDERED IN COUNT 3, WHICH IS MIDDLE TERM OF TWO YEARS, IS TO RUN CONCURRENT WITH THE TIME ORDERED IN COUNTS 1 AND 2.

AND IN EACH OF THE COUNTS, HE'S TO RECEIVE CREDIT FOR A TOTAL OF 207 DAYS, 138 DAYS OF ACTUAL TIME AND 69 DAYS OF GOOD AND WORK TIME CREDITS.

AT THIS TIME, MR. MONGE WILL BE REMANDED TO THE CUSTODY OF LOS ANGELES COUNTY SHERIFF, AND THE SHERIFF IS ORDERED TO DELIVER HIM TO THE DEPARTMENT OF CORRECTIONS AT CHINO, CALIFORNIA. AND THAT WILL BE ON A FORTHWITH BASIS.

AND MR. BESTARD, YOU ARE ORDERED TO REPORT FORTHWITH TO DEPARTMENT - EXCUSE ME. JUST A SECOND.

IS THAT A FORM?

MR. BESTARD: YES, YOUR HONOR. LET THE RECORD REFLECT THAT I HAVE ADVISED MY CLIENT OF HIS RECORD ON APPEAL, THAT HE HAS SIGNED A NOTICE OF APPEAL, A STATEMENT OF APPEAL. I WILL BE TURNING THIS OVER TO THE CLERK AT THIS TIME, YOUR HONOR.

[243] AND MR. MONGE, AS YOU INSTRUCTED ME TO DO SO, YOU HAVE REQUESTED THAT I FILE A NOTICE OF APPEAL ON YOUR BEHALF. IS THAT TRUE, THAT YOU HAVE NOW SIGNED IT AND YOU ARE OBSERVING ME TURN THIS OVER TO THE COURT?

THE DEFENDANT: YES.

MR. BESTARD: AND YOU WAIVE THE COURT READING?

THE COURT: LET'S JUST READ THE RIGHTS THAT ARE HERE.

MR. MONGE, IT IS MY DUTY TO ADVISE YOU THAT YOU HAVE A RIGHT TO APPEAL FROM THE



JUDGMENT AND SENTENCE OF THIS COURT WHEREIN YOU WERE SENTENCED TO THE STATE PENITENTIARY. IF YOU WANT TO APPEAL, YOU HAVE 60 DAYS FROM TODAY'S DATE WITHIN WHICH TO FILE YOUR NOTICE OF APPEAL, AND IF FILED, MUST BE FILED IN THIS CASE AND NOT THE COURT OF APPEAL, MUST BE IN YOUR WRITING, AND IT MUST BE SIGNED BY YOU OR YOUR LAWYER AND INDICATE WHAT PORTION OF THE RECORD YOU ARE APPEALING.

YOU ARE ALSO ENTITLED AT NO COST TO YOU TO A COMPLETE RECORD AND TRANSCRIPT OF ALL TRIAL PROCEEDINGS. IF YOU WANT TO APPEAL BUT YOU DON'T HAVE THE MONEY TO HIRE A LAWYER TO PERFECT YOUR APPEAL, THE APPELLATE COURT WILL APPOINT ONE FREE OF CHARGE IF YOU ARE QUALIFIED.

IT IS YOUR DUTY TO KEEP THE APPELLATE COURT ADVISED OF YOUR CURRENT MAILING ADDRESS SO THEY CAN ADVISE YOU WHETHER OR NOT YOU ARE ENTITLED TO A FREE LAWYER, SHOULD YOU FILE THAT NOTICE OF APPEAL.

YOU UNDERSTAND THOSE RIGHTS AS I HAVE EXPLAINED THEM TO YOU?

[244] THE DEFENDANT: YES, SIR.

THE COURT: YOUR LAWYER IS FILING A NOTICE OF APPEAL FOR YOU TODAY. YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT.

THANK YOU VERY MUCH.

(THE PROCEEDINGS WERE CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES  
DEPARTMENT NO. EA "B" HON. SAM CIANCHETTI,  
JUDGE

THE PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
PLAINTIFF,	)	NO. KA025876
VS.	)	REPORTER'S
ANGEL JAIME MONGE,	)	CERTIFICATE
DEFENDANT.	)	
_____	)	

STATE OF CALIFORNIA	)	
	)	SS.
COUNTY OF LOS ANGELES	)	

I, SHARON BAKER FOX, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 123 AND PAGES 187 THROUGH 244, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON JUNE 8 AND JUNE 12, 1995.

DATED THIS 21ST DAY OF AUGUST 1995.

/s/ Sharon Fox CSR #4332  
OFFICIAL REPORTER

---

[logo]

OFFICE OF THE CLERK  
COURT OF APPEAL  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
JOSEPH A. LANE, CLERK

DANIEL P. POTTER  
Chief Deputy

Second Floor, North Tower  
300 South Spring Street  
Los Angeles, California  
90013  
Telephone: (213) 897-2307

June 7, 1996

David H. Pierce, Esq.  
P.O. Box 641192  
Los Angeles, CA 90064

Daniel E. Lungren, Attorney General  
George Williamson, Chief Asst. Atty. General  
Carol Wendelin Pollack, Senior Asst. Atty. General  
Jaime L. Fuster, Deputy Attorney General  
Carl N. Henry, Deputy Attorney General  
300 South Spring Street, Room 5212  
Los Angeles, CA 90013

Re: *The People v. Angel Jaime Monge*,  
2d Crim. No. B094905  
(Los Angeles Super. Ct. No. KA025876)

Dear Counsel:

The record in this case reflects the presence of an issue not discussed by the parties. Counsel are therefore requested to file supplemental letter briefs discussing the



question of whether there was *sufficient evidence* to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).

The parties may wish to consider *People v. Reed* (1996) 13 Cal.4th 217, 220-231; *People v. Guerrero* (1988) 44 Cal.3d 343, 355, 356, fn. 1; *People v. Piper* (1986) 42 Cal.3d 471, 475-478; *People v. Equarte* (1986) 42 Cal.3d 456, 459, 466; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People v. Goodner* (1992) 7 Cal.App.4th 1324, 1328-1333; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1349-1351; *People v. Williams* (1990) 222 Cal.App.3d 911, 914-918; and *People v. Smith* (1988) 206 Cal.App.3d 340, 345, fn.8.

The requested letter briefs should be filed with this court and served on opposing counsel by no later than 5:00 p.m. on June 17, 1996.

Very truly yours,

JOSEPH A. LANE, Clerk

By /s/ Masumi Gavinski  
Masumi Gavinski  
Deputy Clerk

---

300 SOUTH SPRING STREET, SUITE 5212  
LOS ANGELES, CA 90013  
(213) 897-2000

FACSIMILE: (213) 897-2263  
(213) 897-2273

Presiding Justice Joan Dempsey Klein  
and Associate Justices  
California Court of Appeal  
Second Appellate District, Division Three  
Second Floor, North Tower  
300 South Spring Street  
Los Angeles, California 90013

RE: People v. Angel Jaime Monge  
2d Crim. No. B094905; Our No. LA95DA2024

Dear Presiding Justice Klein and Associate Justices:

REMAND IS WARRANTED IN VIEW OF OUR  
SUPREME COURT'S VERY RECENT DECISION  
IN *PEOPLE V. REED* (1996) 13 CAL.4TH 217

On its own motion, this Court has ordered the parties to discuss "whether there was *sufficient evidence* to support the finding by the court [RT 238; CT 87] that appellant suffered a prior felony conviction pursuant to" the

"In particular, the parties are requested to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1) [the Three Strikes Law]." (Original Italics.)

With respect to the prosecution's burden to prove a defendant suffered a "serious felony" within the meaning of the felonies listed in section 1192.7, subdivision (c), our

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.



Supreme Court has held under the so-called "the *Guerrero* rule" [*People v. Guerrero* (1988) 44 Cal.3d 343]: "[T]he trier of fact may look to the entire *record of conviction* to determine the substance of the prior conviction." (*People v. Reed* (1996) 13 Cal.4th 217, 223, original italics (citing *People v. Guerrero, supra*, 44 Cal.3d at p. 355).) The *Reed* court stated: "In *Guerrero* we declined to address any question regarding 'what items in the record of conviction are admissible and for what purposes.' " (*People v. Reed, supra*, 13 Cal.4th at p. 223, footnote omitted (citing *People v. Guerrero, supra*, 44 Cal.3d at p. 356, fn. 1); *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350 [discusses and cites authority concerning this issue]; *People v. Williams* (1990) 222 Cal.App.3d 911, 916 [same].) *Reed* held excerpts from a preliminary hearing transcript are admissible under the former testimony exception (Evid. Code, § 1291) to the hearsay rule (Evid. Code, § 1200) to prove the substance of a prior conviction (*People v. Reed, supra*, 13 Cal.4th at pp. 220, 225-229),<sup>2</sup> but excerpts from a probation report are inadmissible hearsay and thus may not be used to prove the substance of a prior conviction (*People v. Reed, supra*, 13 Cal.4th at pp. 230-231).<sup>3</sup>

<sup>2</sup> The *Reed* court stated: "We conclude the [preliminary hearing] transcript was part of the record of the prior conviction" (*People v. Reed, supra*, 13 Cal.4th at 223), and stated: "The certified transcript, introduced to prove the events of the prior proceeding, was within the exception for official records (Evid. Code, § 1280; *People v. Abarca* [(1991)] 233 Cal.App.3d 1347, 1350); indeed, the transcript is, by statute, deemed prima facie evidence of the prior testimony. (Code Civ. Proc., § 273.)" (*People v. Reed, supra*, 13 Cal.4th at p. 225).

<sup>3</sup> The *Reed* court declined to state whether the probation officer's report is "part of the record" of the prior conviction. (*People v. Reed, supra*, 13 Cal.4th at 230.)

As to the 1992 assault conviction in Case No. KA013241, it would appear there is nothing in the record which proves appellant *personally* inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7.<sup>4</sup> (See RT 189-193, 238; CT 85 [the abstract of judgment from the 1992 assault conviction], 87, 94 [excerpt from the probation report]<sup>5</sup>.) While its [sic] true the

<sup>4</sup> Respondent notes, however, appellant did not object to the following argument made by the prosecutor to the court: "In the prior case that the defendant pled guilty to, KA012341, it was alleged in count I that he committed a crime of assault with a deadly weapon, to wit, a stick upon the victim of Miss Garcia. And there was no other defendants in that case. And, in fact, the defendant pled guilty to it, in which case he personally used the deadly weapon, a stick upon the victim in the case, which would make it a serious felony according to 1192.7, also *People v. Arwood* [sic]." (RT 189-190.)

<sup>5</sup> Appellant has *waived* any hearsay objection to the use of the probation report to prove he *personally* inflicted great bodily injury and/or used a dangerous or deadly weapon within the meaning of subdivision (c) of section 1192.7. This is so because "there is a general rule against considering points on appeal not raised in the trial court. [Citation.]" (*In re Andre P.* (1991) 226 Cal.App.3d 1164, 1169; see *Burden v. Snowden* (1992) 2 Cal.4th 556, 570; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 724-725 [defendant waived due process claim his sentence was improperly aggravated].) Indeed, the *Reed* court held as it did after noting: "Defendant unsuccessfully objected to both documents [the preliminary hearing transcript excerpts and the probation report excerpts] on grounds of hearsay and lack of foundation." (*People v. Reed, supra*, 13 Cal.3d at p. 221.) By contrast, appellant did not object in the trial court to the use of the probation report on hearsay grounds. Thus, he is precluded from raising that objection on appeal. (See Evid. Code, § 353.)

abstract of judgment of the 1992 proceeding indicates appellant's "ADW GBI" conviction was obtained pursuant to a guilty plea (CT 85), the law is clear: Absent a valid admission that a prior conviction was a serious felony, proof of a prior conviction establishes only the minimum elements of the crime and the prosecution cannot go behind the record of the conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime. (*People v. Piper* (1986) 42 Cal.3d 471, 475, citation omitted.) The court in *People v. Equarte* (1986) 42 Cal.3d 456, stated: "[A]n assault-with-a-deadly-weapon conviction may constitute a 'serious felony' within the relevant statutes if the prosecution properly established that the defendant 'personally used a dangerous or deadly weapon' in the commission of the offense (§ 1192.7, subd. (c)(23))." (*Id.*, at p. 459.) "[S]imple assault with a deadly weapon is not one of the offenses specifically named in section 1192.7, subdivision (c)[.]" (*Id.*, at p. 466.)<sup>6</sup>

<sup>6</sup> Compare *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1371-1373 ["No other evidence was offered. The evidence was sufficient to prove appellant was convicted of second degree burglary, a felony. It was utterly insufficient to prove that the burglary appellant was convicted on concerned 'an inhabited dwelling house' . . . "] to *People v. Goodner* (1992) 7 Cal.App.4th 1324, 1333 ["The probation report from 69112 contains defendant's admissions that he and his accomplice chose to burglarize a 'home' and that they were inside the 'residence' for about five minutes when defendant poured some vodka from a flask while his accomplice ransacked the home, from which they then stole money and jewelry"] ["Defendant's admissions of what he did in the house, what was inside the house, including the fact that there was an identifiable 'bedroom,' and what he and his accomplice took from the house, provided evidence

Accordingly, in light of the fact our Supreme Court decided *People v. Reed*, *supra*, 13 Cal.4th 217, after briefing in the instant case, respondent submits this case should be remanded so that the People may properly prove beyond a reasonable doubt,<sup>7</sup> either through excerpts from the preliminary hearing transcripts (*People v. Reed*, *supra*, 13 Cal.4th at pp. 225-229) or through an admission by appellant which may be recorded in the probation report in Case No. KA013241 (*People v. Goodner*, *supra*, 7 Cal.App.4th at pp. 916-917),<sup>8</sup> that appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7 in Case No. KA013241 (see RT 189-190). (See *In re Moser* (1993) 6 Cal.4th 342, 345 ["Under these circumstances, we conclude that this matter should be remanded to the superior court to provide both parties the opportunity to present evidence relevant to these issues, and to enable the superior court to consider petitioner's claim in light of the governing legal principles set forth in this opinion"]; *People v. Goodner*, *supra*, 7

from which a rational trier of fact could make an inference of residence"].

<sup>7</sup> "[T]he state must prove the elements of a prior conviction enhancement true beyond a reasonable doubt." (*People v. Williams*, *supra*, 222 Cal.App.3d at p. 915)

<sup>8</sup> See, e.g., *People v. Abarca*, *supra*, 233 Cal.App.3d at pp. 1349-1351 [reporter's transcript of Abarca's plea in his prior conviction properly used to prove that conviction was a "serious felony"]; *People v. Smith* (1988) 206 Cal.App.3d 340, 345 [guilty plea waiver form signed by defendant in which he acknowledged the facts underlying the prior conviction properly used to prove that conviction was a "serious felony"].



Cal.App.4th at p. 1330 ["Upon remand in the case at bar, the probation report was admitted pursuant to our holding in *Goodner I*; the trial court allowed as admissions only defendant's statements regarding the nature of the prior offense while other hearsay in the report was excluded"]; but see *People v. Williams, supra*, 222 Cal.App.3d at p. 918 ["the proper remedy is to strike the enhancement"]; accord, *People v. Jackson, supra*, 7 Cal.App.4th at pp. 1373-1374.) There are no double jeopardy obstacles to remand in the instant case. (See *People v. Saunders* (1993) 5 Cal.4th 580, 596-597 ["We hold that, because determination of the truth of the alleged prior convictions was bifurcated from the trial of the current charges, the court's action in conducting further proceedings to determine the truth of those allegations, following discharge of the jury that returned the guilty verdict, did not violate the double jeopardy clause of either the United States Constitution or the California Constitution"]; *People v. Torres* (1996) 45 Cal.App.4th 640, 644 ["We also conclude the People are not barred by double jeopardy from proceeding on the [prior "strike"] allegations on remand"].)

Respectfully submitted,  
 DANIEL E. LUNGREN,  
 Attorney General  
 of the State of California  
 GEORGE WILLIAMSON,  
 Chief Assistant Attorney  
 General  
 CAROL WENDELIN POLLACK  
 Senior Assistant Attorney  
 General

SUSAN D. MARTYNEC  
 Supervising Deputy Attorney  
 General  
 PAMELA C. HAMANAKA  
 Supervising Deputy Attorney  
 General

/s/ Carl N. Henry  
 CARL N. HENRY  
 Deputy Attorney General  
 State Bar No. 168047  
 Attorneys for Respondent

---

## DECLARATION OF SERVICE BY MAIL

Re: Peo. v. Angel Jaime Monge No. B094905

I, the undersigned, certify and declare that I am a resident of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within cause; my business address is 300 So. Spring St., Los Angeles, California, 90013.

On June 17, 1996, I served a copy of:

LETTER DATED JUNE 17, 1996, TO HONORABLE JOAN DEMPSEY KLEIN, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES, CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, 300 SOUTH SPRING STREET, LOS ANGELES, CA 90013.

to the following, by placing same in an envelope addressed as follows:

David H. Pierce, Esq.  
P.O. Box 641192  
Los Angeles, CA 90064

Said envelope was then sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1996, at Los Angeles, California.

/s/ Carmen C. Gonzalez  
Declarant

---



NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS  
IN THE COURT OF APPEAL OF THE STATE  
OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,	)	B094905
Plaintiff and Respondent,	)	(Super. Ct. No.
v.	)	KA025876)
ANGEL JAIME MONGE,	)	(Sam Cianchetti,
Defendant and Appellant.	)	Judge)
	)	(Filed
	)	Jul. 25, 1996)

THE COURT:\*

Angel Jaime Monge appeals from the judgment entered following his convictions by jury of use of a minor to sell or transport marijuana, sale or transportation of marijuana, and possession of marijuana for sale, with a court finding that he suffered a prior felony conviction and a prior felony conviction for which he served a separate prison term. (Health & Safe. Code, §§ 11359, 11360, Subd. (a), 11361, subd. (a); Pen. Code, §§ 667, subd. (d), 667.5, subd. (b).) He was sentenced to prison for 11 years and contends: "The Two-Strikes Law denies appellant's rights to due process, as its classifications fail even the most minimal rational relationship test."

\* CROSKEY, Acting P.J., ALDRICH, J., and RECANA, J.\*\*

\*\* Judge of the Municipal Court sitting under assignment by the Chairperson of the Judicial Council.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on January 25, 1995, appellant sold or transported marijuana in Pomona, using a minor to do so, and, after the transaction, possessed other marijuana for sale. In defense, appellant presented evidence that the offenses were not committed.

DISCUSSION

*There was insufficient evidence that appellant suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d) and 1170, subdivision (b)(1).*

Appellant contends Penal Code section 667, subdivisions (b) through (i) denies appellant's rights to due process, as that section's classifications fail even the most minimal rational relationship test. However, there is no need to decide that issue.

We have requested, and received, supplemental briefing on the issue of whether there was sufficient evidence to support the finding by the court that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).<sup>1</sup> Appellant contends, in

<sup>1</sup> In particular, we requested the parties to discuss whether there was sufficient evidence that, as to the felonious assault of which appellant was convicted in 1992 in case No. KA013241, appellant personally inflicted great bodily injury within the

essence, that the evidence was insufficient. We conclude the contention is well-taken.

The amended information alleged that appellant suffered a July 2, 1992, conviction for "ASSAULT WITH A DEADLY WEAPON" in violation of [Penal Code] section 245(a)(1)" in case No. KA013241 pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).<sup>2</sup> At the court trial on the allegation, the court stated that "the only evidence to be considered by the court is the *conviction* which the court will take judicial notice of in case number [KA013241]." (Italics added.) The People proffered People's exhibit No. 1, a Penal Code section 969b prison packet dated February 17, 1995. That exhibit reflects appellant was previously convicted as indicated above for felonious assault. The exhibit characterized the crime as "245(a)(1) . . . ADW GBI" and "ASLT W/DW (245(a)(1)PC)."<sup>3</sup> People's exhibit No. 1 was "received in evidence."<sup>4</sup> The court

---

meaning of Penal Code section 1192.7, subdivision (c)(8), and/or *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23), to the extent either subdivision is relied upon to establish that he suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivision (d)(1) and 1170.12, subdivision (b)(1).

<sup>2</sup> That prior conviction was also the basis for the Penal Code section 667.5, subdivision (b) enhancement.

<sup>3</sup> Appellant acknowledged the People had shown the exhibit to appellant before trial.

<sup>4</sup> The June 12, 1995, minute order pertaining to the court trial reflects, "People's exhibit 1-department of corrections document is received in evidence." No other court trial evidence is referred to in the minute order.

found true that appellant suffered "the prior felony. . . . The felony being personal use of a deadly weapon in violation section 245, 245(a)(1)." Appellant was sentenced to prison for 11 years, consisting of a 10-year middle term pursuant to Penal Code section 667, subdivision (e)(1) for using a minor, plus 1 year pursuant to Penal Code section 667.5, subdivision (b). He also received a concurrent two-year term for the possession of marijuana for sale conviction, and punishment on his conviction for the sale or transportation of marijuana was stayed pursuant to Penal Code section 654.<sup>5</sup>

Based on the above, the court's true finding that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), was based on insufficient evidence. A review of People's exhibit No. 1 reveals that, although it reflects the above indicated prior felonious assault conviction, the exhibit does not expressly state whether appellant *personally* inflicted great bodily injury within the meaning of Penal Code section 1192.7 subdivision (c)(8), or whether he *personally* used a dangerous or deadly weapon within the meaning of Penal Code section 1192.7, subdivision (c)(23). The omissions, insofar as People's exhibit No. 1 is concerned, are fatal. Nor does the fact that the court took judicial notice of the bare "conviction"<sup>6</sup> supply the requisite

---

<sup>5</sup> At sentencing, the court stated that the issue of the prior conviction was submitted based upon the prison packet and "evidence contained in [the] court file. . . ."

<sup>6</sup> As mentioned, during the court trial the court stated, "the only evidence to be considered by the court is the conviction



proof. (*People v. Piper* (1986) 42 Cal.3d 471, 475-478; see *People v. Equarte* (1986) 42 Cal.3d 456, 459, 466; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370-1373; *People v. Williams* (1990) 222 Cal.App.3d 911, 914-915.)<sup>7</sup>

We are not confronted with the issue of whether the trial court would have been entitled to look beyond the judgment to the entire record of conviction to determine the truth of the enhancement. Clearly this would have been permissible. (*People v. Guerrero* (1988) 44 Cal.3d 343,

---

which the court will take judicial notice of in case number [KA013241].” Although the court referred here to “evidence,” we view that reference as informal, and further view the court’s statement only as a taking of “judicial notice” of the conviction. The only item that the People formally proffered as “evidence” was People’s exhibit No. 1. This was the only item appellant acknowledged having been shown by the People before trial, and was the only item to which he objected. Moreover, People’s exhibit No. 1 was the only item the court expressly stated had been received in “evidence,” and was the only item referred to as “evidence” in the pertinent minute order.

<sup>7</sup> The court’s sentencing comment that the prior conviction issue was submitted based in part upon “evidence contained in [the] court file” does not compel a contrary conclusion. First, the comment was post-trial and may not be relied upon; the People were required to *prove* the prior conviction allegation *at trial*. (*People v. Jackson*, *supra*, 7 Cal.App.4th at pp. 1370-1373.) Second, we viewed the above quoted comment as an informal reference to the fact that, at the court trial, the court took judicial notice of the fact of the prior conviction from the court file pertaining to that prior conviction. The only “evidence” at the court trial was People’s exhibit No. 1. (See fn. 6, *supra*.) We note the sentencing comment omitted that, at the court trial, the court expressly referred to the taking of “judicial notice.” In any event, the court file was used at the court trial only to prove the fact of the prior “conviction.”

345, 355-356.) However, *Guerrero* did not hold Penal Code section 1025 no longer requires that when a defendant denies having suffered an alleged prior conviction, the issue, if jury is waived, must be “tried” by the court. *Guerrero*, in short, did not hold the People were no longer obligated to prove their case. In fact, *Guerrero* expressly declined to decide what items in a record of conviction were “admissible” (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 356, fn.1), thus using an *evidentiary* term. Accordingly, we conclude the court erred by finding true the allegation that appellant suffered a prior felony conviction pursuant to Penal Code sections 667, subdivision (d)(1), and 1170.12, subdivision (b)(1), and by imposing sentence accordingly.

Respondent argues in its supplemental brief that this case should be remanded for a retrial on the prior conviction allegation. We disagree. The fact that *People v. Reed* (1996) 13 Cal.4th 217, was decided after the present case was fully briefed is unavailing. The conclusion that the evidence was insufficient in the present case was mandated by *pre-Reed* law. Moreover, in *Piper*, *Jackson*, and *Williams*, *supra*, for example, there was insufficient evidence to support a Penal Code section 667, subdivision (a) enhancement. In each case, imposition of sentence on the enhancement was effectively barred, and no remand for retrial on the enhancement allegation occurred. (*People v. Piper*, *supra*, 42 Cal.3d at pp. 475-478; *People v. Jackson*, *supra*, 7 Cal.App.4th at pp. 1370-1373; *People v. Williams*, *supra*, 22 Cal.App.3d at pp. 914-918.)

Respondent’s reliance upon *In re Moser* (1993) 6 Cal.4th 342, and *People v. Goodner* (1992) 7 Cal.App.4th 1324, for a contrary conclusion is misplaced. Neither

involved a remand for a retrial. *Moser* involved an appeal of a guilty plea entered following a misadvisement concerning consequences of the plea, and the court remanded for a hearing (not a trial) on the issue of prejudice. The decision in *Goodner* did not remand for a retrial but simply affirmed the judgment. The only remand that occurred in that defendant's case occurred in an earlier appellate decision that remanded for further proceedings following a reversal, not of a true finding on a prior conviction allegation based on insufficiency of evidence, but of *pretrial* orders striking prior serious felony allegations.

Respondent further claims that a remand for a retrial on the prior conviction allegation would not violate double jeopardy principles. We disagree. The double jeopardy clauses bar a retrial where a true finding on a prior conviction allegation is reversed based on insufficiency of the evidence. (*People v. Goodner* (1990) 226 Cal.App.3d 609, 613; *People v. Hockersmith* (1990) 217 Cal.App.3d 968, 972;<sup>8</sup> *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1302-1309; *People v. Jones* (1988) 203 Cal.App.3d 456, 460;<sup>9</sup> see also *People v. Saunders* (1993) 5 Cal.4th 580, 583, where the Supreme Court stated, "We assume, without deciding, that double jeopardy principles apply to allegations of prior convictions.")<sup>10</sup>

<sup>8</sup> Disapproved on another point in *People v. Saunders* (1993) 5 Cal.4th 580, 597, fn.9.

<sup>9</sup> Disapproved on another point in *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn.2.

<sup>10</sup> The issue of whether the double jeopardy clauses bar a retrial where a true finding on a Penal Code section 667,

Respondent's reliance upon *People v. Saunders, supra*, and *People v. Torres* (1996) 45 Cal.App.4th 640, is misplaced. Again, neither involved a remand for a retrial where the evidence mustered by the People and submitted at a previous trial was insufficient. Indeed, *Saunders*, as noted previously, assumed double jeopardy principles applied to prior conviction allegations. It is true that the case in *Saunders* was remanded for trial on a prior conviction allegation. However, trial proceedings on the prior conviction allegation in that case had been bifurcated and the jury had been discharged before any trial on the prior conviction allegation had occurred. Similarly, in *Torres*, appellant entered a plea bargain to a substantive offense, and the Three Strikes prior conviction allegation remained unresolved since appellant had not admitted it and the allegation had never been tried. *Torres* remanded for trial or other disposition of the allegation.

Since the trial court in the present case imposed sentence pursuant to a sentencing scheme (*People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458; *People v. Savala* (1983) 147 Cal.App.3d 63, 66-70) in which, even absent application of Penal Code section 667k subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), sentencing discretion remains, we will vacate appellant's entire sentence and remand his case for resentencing only. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.)<sup>11</sup>

subdivision (a) enhancement allegation is reversed based on insufficiency of the evidence is presently before our Supreme Court in *People v. Hernandez* (S047306).

<sup>11</sup> We leave undisturbed the true finding as to the Penal Code section 667.5, subdivision (b) enhancement allegation.



## DISPOSITION

We reverse the finding that appellant suffered a July 2, 1992, felonious assault conviction in case No. KA013241 within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), vacate his sentence, and remand the matter for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL  
REPORTS

---

## IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	S055881
Plaintiff and Respondent,	)	Ct. App. 2/3 B094905
v.	)	Los Angeles County
ANGEL JAIME MONGE,	)	Super. Ct. No. KA025876
Defendant and Appellant.	)	(Filed Aug. 27, 1997)
_____	)	

In this case, we consider the applicability of the state and federal prohibitions against double jeopardy to a proceeding to determine the truth of a prior conviction allegation. We conclude that, in this noncapital case, the state and federal prohibitions against double jeopardy do not apply. Accordingly, we reverse the judgment of the Court of Appeal to the extent that judgment bars retrial of the prior conviction allegation on double jeopardy grounds.

## FACTS AND PROCEDURAL BACKGROUND

During the afternoon of January 25, 1995, as Pomona Police Department undercover officers were driving an unmarked car on West Ninth Street in the City of Pomona, they spotted a 13-year-old boy standing near the curb. The boy motioned the officers to pull over, but instead they pulled into an alley that led to the rear of an apartment complex where police had earlier observed narcotics activity. Once in the carport area at the rear of the complex, the officers spotted defendant Angel Jaime Monge. Defendant approached the car, and one of the officers rolled down the window and asked where he

could buy marijuana. Defendant did not answer, but walked to a carport. The officers turned their car around and then noticed the young boy who had earlier motioned them to pull over, now standing some distance behind their car. Defendant returned and gave the boy several plastic bags. The boy then approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two \$10 bills for two plastic bags of marijuana. After leaving the alley, the officers reported the sale to other Pomona officers, who arrested defendant and the boy. Police searched defendant and found the two \$10 bills that the officers had given to the boy.

The District Attorney of Los Angeles County charged defendant with using a minor to sell marijuana (Health & Saf. Code, § 11361, subd. (a)), sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and possession of marijuana for sale (Health & Saf. Code, § 11359). The district attorney also alleged defendant had suffered a prior serious felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds.(b)-(i), 1170.12, subds. (a)-(d)),<sup>1</sup> and a prior prison term within the meaning of section 667.5, subdivision (b). Specifically, the district attorney alleged a July 2, 1992, conviction and prison term for assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant pleaded not guilty and denied all sentencing allegations.

Defendant waived his right to a jury trial of the prior conviction and prior prison term allegations, and the

---

<sup>1</sup> All further statutory references are to the Penal Code.

court granted his request to bifurcate determination of those allegations. A jury found defendant guilty of the substantive charges. When proceedings reconvened the following week, the court asked defense counsel if defendant wanted to admit the prior conviction, and defense counsel said, "That's correct, Your Honor." The court then asked defendant if he understood, and defendant said, "Yes." After an off-the-record discussion, the court again asked if defendant wanted to admit the prior conviction, and defense counsel said, "No, he doesn't. He wishes the court to try the prior without the jury."

The prosecutor asserted that the prior assault conviction was a serious felony for purposes of the Three Strikes law. Defense counsel disagreed, arguing the weapon involved in the prior crime was not a deadly weapon. The court interrupted to point out that defendant had pleaded guilty to assault with "a deadly weapon" and thus had admitted the weapon was deadly. The court stated it would take judicial notice of the prior conviction and asked if the parties submitted the matter on that evidence alone. The prosecution then offered as additional evidence a "prison packet" (see § 969b) dated February 17, 1995, and an abstract of judgment. This additional evidence characterized defendant's prior conviction as "PC 245(a)(1) ADW GBI" and "ASLT W/DW (245(a)(1)PC)." Defense counsel submitted the matter after questioning whether the prosecution's documentary evidence, which included a photograph and fingerprints, related to defendant.

The court found true that defendant suffered a prior serious felony conviction, "[t]he felony being personal use of a deadly weapon in violation [of] section 245,



245(a)(1)." The court also found true the prior prison term allegation. The court imposed an eleven-year sentence, including five years for using a minor to sell marijuana, which the court doubled to ten years under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus a one-year enhancement for the prior prison term (§ 667.5, subd. (b)) and two years to run concurrently for possessing marijuana for sale. Under section 654, the court stayed the sentence for defendant's conviction of selling marijuana.

On appeal, defendant challenged the Three Strikes law as a violation of his right to due process. On its own motion, the Court of Appeal requested supplemental briefing on whether sufficient evidence supported the trial court's finding that defendant had suffered a prior serious felony conviction within the meaning of the Three Strikes law. Under the Three Strikes law, a prior felony conviction may affect the sentence for the present offense if the conviction was of a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Of the felonies and categories of felonies listed in section 1192.7, subdivision (c), defendant's July 2, 1992, felony conviction might have qualified as a "serious felony" under either subdivision (c)(8), which refers to "any . . . felony in which the defendant *personally* inflicts great bodily injury on any person, other than an accomplice . . .," or subdivision (c)(23), which refers to "any felony in which the defendant *personally* used a dangerous or deadly weapon." (Italics added.)

The Court of Appeal affirmed defendant's conviction, but reversed the trial court's true finding on the prior serious felony allegation, holding the evidence

insufficient to establish that defendant had acted personally. In addition, the Court of Appeal held that the state and federal constitutional protections against double jeopardy barred retrial of the prior serious felony allegation. Thus, the Court of Appeal remanded for resentencing.

We granted review in order to consider whether the state and federal prohibitions against double jeopardy apply to a proceeding, in a noncapital case, to determine the truth of a prior serious felony allegation.

#### DOUBLE JEOPARDY

##### *Federal Constitution*

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Among other things, this constitutional guaranty, known as the double jeopardy clause, "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 (*Pearce*), fn. omitted.) In *Benton v. Maryland* (1969) 395 U.S. 784, 796, the Supreme Court held that the double jeopardy prohibition was " 'fundamental to the American scheme of justice' " and therefore enforceable against the states as an element of the due process protection embodied in the Fourteenth Amendment. Nevertheless, the Supreme Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions. We have on a few occasions noted and expressly declined to

decide this question. (*People v. Valladoli* (1996) 13 Cal.4th 590, 608; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn. 8; *People v. Saunders* (1993) 5 Cal.4th 580, 593.)

At the outset we emphasize that, in the absence of a statutory provision, a criminal defendant is not entitled as a federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions. In *Williams v. New York* (1949) 337 U.S. 241 (*Williams*), a jury convicted the defendant of first degree murder and recommended life imprisonment. (*id.* at pp. 242-243.) The judge, however, sentenced the defendant to death after considering the evidence "in the light of additional information obtained through the court's 'Probation Department, and through other sources.'" (*id.* at p. 242.) Among other things, the judge noted that the defendant had been involved in " 'thirty . . . burglaries in and about the same vicinity.'" (*id.* at p. 244.) No court had ever convicted the defendant of these 30 burglaries, but "the judge had information that [the defendant] had confessed to some and had been identified as the perpetrator of some of the others." (*Ibid.*) The judge's rather informal fact-finding procedure was consistent with applicable New York law, which permitted the sentencing court to " 'seek any information that will aid the court'" (*id.* at p. 243), including information "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine" (*id.* at p. 245).

The United States Supreme Court upheld the sentence. The high court noted that the procedural protections applicable in a trial on guilt (notice of the charges,

opportunity to cross-examine adverse witnesses, opportunity to offer evidence, and representation by counsel) traditionally have not applied at sentencing. (*Williams, supra*, 337 U.S. at pp. 245-246) Historically, the court pointed out, sentencing judges could even rely on their personal knowledge of a defendant. (*id.* at p. 246.) The court concluded, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." (*id.* at p. 251.)

The high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht v. Patterson* (1967) 386 U.S. 605, 606. Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner v. Florida* (1977) 430 U.S. 349), it has otherwise reaffirmed *Williams* as recently as last term. (*U.S. v. Watts* (1997) \_\_\_ U.S. \_\_\_, [117 S.Ct. 633, 635]; see also *Witte v. U.S.* (1995) \_\_\_ U.S. \_\_\_, [115 S.Ct. 2199, 2205] ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.'" ].)

Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the procedural boundaries of that trial. So long as the state affords minimal due process of law, it need not provide all the procedural guaranties that characterize a



trial on guilt or innocence. Thus, a state that provides a trial of sentencing allegations need not provide a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 274, 277; *People v. Wims* (1995) 10 Cal.4th 293, 304-306; *People v. Wiley*, *supra*, 9 Cal.4th at pp. 584-585, 589.) For the same reason, a state that provides a trial of sentencing allegations arguably need not provide double jeopardy protection.

Though states need not provide a trial of sentencing allegations, the California Legislature has elected to grant defendants a statutory right to a jury trial of prior conviction allegations. Section 1025 provides: "[T]he question whether or not [a defendant] has suffered [a] previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose. . . ." A survey of our decisions indicates that we have expanded section 1025's bare grant of a jury trial to include various procedural guaranties. For example, we have stated in dictum that the prosecution must prove a prior conviction allegation beyond a reasonable doubt (*People v. Tenner* (1993) 6 Cal.4th 559, 566 (*Tenner*); *In re Yurko* (1974) 10 Cal.3d 857, 862) and that the accused enjoys the privilege against self-incrimination (*In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5). Similarly, we have held that the rules of evidence apply in these trials. (*People v. Reed* (1996) 13 Cal.4th 217, 224; *People v. Myers* (1993) 5 Cal.4th 1193, 1201.) Finally, we have stated that a defendant in a trial of a prior conviction allegation has a right to " 'be confronted with witnesses against him [and] to cross-examine' " those witnesses. (*People v. Reed*, *supra*, 13 Cal.4th at p. 228, fn. 6, quoting *Specht v. Patterson*, *supra*, 386 U.S. at p. 610; *In re Yurko*, *supra*, 10 Cal.3d at p. 863, fn. 5.)

Arguably, the next step in the logical progression of these decisions is for us now to hold that the constitutional protections against double jeopardy apply. Constitutional law, however, does not grow inevitably by accretion; rather, each question rises or falls on its individual merits.

With this point in mind, we turn to an analysis of the double jeopardy clause of the federal Constitution. The double jeopardy clause by its terms proscribes a second jeopardy "for the same offense." (U.S. Const., 5th Amend., *italics added*.) The clause makes no express reference to sentencing determinations. Our review of the Supreme Court's decisions indicates that court is reluctant to apply the clause to sentencing determinations. In *Stroud v. United States* (1919) 251 U.S. 15 (*Stroud*), a jury found the defendant guilty of first degree murder " 'without capital punishment,' " which was one of its options under the applicable statute. (*id.* at pp. 17, 18.) After the Supreme Court reversed that judgment, a jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. (*id.* at p. 17.) The Supreme Court held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the court did not consider the verdict of "guilty . . . 'without capital punishment' " as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." (*id.* at p. 18.)

The Supreme Court reaffirmed *Stroud* in *Pearce*, *supra*, 395 U.S. at p. 720. In *Pearce*, the court resolved two cases

in which the defendants successfully challenged their convictions, only to receive longer overall sentences following retrials. Moreover, neither defendant received credit for time served. (*id.* at pp. 713-715.) The Supreme Court held that the double jeopardy clause entitled the defendants to credit for time served. (*id.* at pp. 718-719.) Nevertheless, the double jeopardy clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." (*id.* at p. 719.)

In *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 23-24, in which the jury imposed the sentence instead of the judge, the Supreme Court, without discussion, again reaffirmed that the double jeopardy clause does not preclude a longer sentence following retrial. Finally, in *United States v. DiFrancesco* (1980) 449 U.S. 117 (*DiFrancesco*), the high court considered a statutory sentencing scheme that allowed the federal court of appeals to review the sentence that the federal district court had imposed and, at the prosecution's request, to increase that sentence "after considering the record" and "after hearing." (*id.* at p. 120, fn. 2.) The high court determined that this scheme did not violate the double jeopardy clause, noting that "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*id.* at p. 133.)

Thus, in a variety of contexts, the Supreme Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings. *Bullington v. Missouri*

(1981) 451 U.S. 430 (*Bullington*) marked the first departure from this consistent approach.

*Bullington* concerned imposition of the death penalty under Missouri law. In accord with the Supreme Court's decisions in *Furman v. Georgia* (1972) 408 U.S. 238 *Gregg v. Georgia* (1976) 428 U.S. 153 and the capital cases decided on the same day as *Gregg*, Missouri's death penalty statute included intricate procedural safeguards. For example, the trial court had to conduct a separate presentence hearing for a defendant convicted of capital murder. The hearing had to be held before the same jury that found the defendant guilty. At the hearing, the jury considered additional evidence and determined whether any aggravating or mitigating circumstances existed, whether the aggravating circumstances warranted the death penalty, and whether the mitigating circumstances outweighed the aggravating circumstances. The jury had to make its findings beyond a reasonable doubt. Finally, the court had to instruct the jury that it need not impose the death penalty even if it found sufficient aggravating circumstances that mitigating circumstances did not outweigh. (*Bullington, supra*, 451 U.S. at pp. 433-435.)

A Missouri jury convicted Robert Bullington of capital murder. As required, the court held a presentence hearing, and the jury returned a verdict of "imprisonment for life without eligibility for probation or parole for 50 years." (*Bullington, supra*, 451 U.S. at p. 436.) The trial court then granted Bullington's motion for a new trial, finding error in jury selection. Despite the Supreme Court's decision in *Stroud, supra*, 251 U.S. 15, the court



also ruled, on double jeopardy grounds, that the prosecution could not seek the death penalty on retrial. (*Bullington*, *supra*, 451 U.S. at p. 436.) The prosecution petitioned for a writ of prohibition or mandamus, and the state supreme court granted the writ, holding that double jeopardy principles did not bar the prosecution from seeking the death penalty. (*id.* at pp. 436-437.) The United States Supreme Court reversed, holding that the double jeopardy clause did bar imposition of the death penalty. (*id.* at pp. 446-447.) Noting that, under the applicable Missouri death penalty law, the jury determined the sentence at "a separate hearing" and did not have "unbounded discretion," but rather chose "between two alternatives," and that "the prosecution . . . undertook the burden of establishing certain facts beyond a reasonable doubt" (*id.* at p. 438), the high court reasoned that the penalty phase of a Missouri capital trial had "the hallmarks of the trial on guilt or innocence" (*id.* at p. 439) and therefore that the double jeopardy prohibition applied (*id.* at pp. 438, 446). The court reaffirmed *Bullington* in *Arizona v. Rumsey* (1984) 467 U.S. 203, 212, a case in which the judge, not the jury, determined the appropriate sentence.

On its face, a section 1025 trial at which a California jury determines the truth of a prior conviction allegation also has "the hallmarks of the trial on guilt or innocence." Thus, the defendant has a right to counsel, notice, and an opportunity to be heard. (*Oyler v. Boles* (1962) 368 U.S. 448, 452.) The prosecution must "plead and prove" the prior conviction allegation (§§ 667, subds. (c) and (g), 1170.12, subds. (a) and (e)) at a "trial" (§ 1025). The prosecution has the burden of proof beyond a reasonable

doubt. (*Tenner*, *supra*, 6 Cal.4th at p. 566.) Finally, the trier of fact faces a choice between two alternatives. (§ 1158.) Nevertheless, for reasons we discuss below, we believe *Bullington's* "hallmarks of the trial" analysis does not apply here.

Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania v. Goldhammer* (1985) 474 U.S. 28 the court reaffirmed that its decisions " 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.' " (*id.* at p. 30, bracketed language in *Goldhammer*, italics added.) Similarly, in *Caspari v. Bohlen*, the court noted that *Bullington* "was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari v. Bohlen* (1994) 510 U.S. 383, 392 (*Caspari*).) The court added: "*Goldhammer* and *Strickland* [*v. Washington* (1984) 466 U.S. 668] strongly suggested that *Bullington* was limited to capital sentencing." (*Caspari*, *supra*, 510 U.S. at p. 393.)

Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decisions interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected *at its option* to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural

protections that apply in a constitutionally mandated trial.

Furthermore, despite some common procedural protections, the sentencing proceeding here and that in *Bullington* are more unlike than alike. First, the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases. Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances relating to the defendant's character. A section 1025 trial does not then require a finding that the aggravating circumstances warrant a longer sentence or a weighing of aggravating circumstances against mitigating circumstances. Nor does a section 1025 trial allow the trier of fact to reject a longer sentence even if its factual determinations support the sentence. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here.

In deciding *Bullington*, the court reaffirmed the general rule that the double jeopardy clause does not apply to sentencing proceedings. (*Bullington, supra*, 451 U.S. at p. 438.) The court then carved out a narrow exception to this general rule. (*Ibid.*) The court did not overrule *Stroud, supra*, 251 U.S. 15, which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. (*Bullington, supra*, 451 U.S. at p. 446.) Most of those procedural safeguards are

unique to death penalty determinations and simply do not apply here.

Second, the financial and emotional burden of the sentencing proceeding at issue in *Bullington* distinguishes *Bullington* from this case. The court in *Bullington* stressed that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." (*Bullington, supra*, 451 U.S. at p. 445.) By comparison, though a trial of prior conviction allegations is undoubtedly *important* to a defendant – possibly increasing a short prison term to a life term – the level of embarrassment, expense, and anxiety involved is not "equivalent to that faced . . . at the guilt phase" of the trial. (*Ibid.*) This lesser financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence.

The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which, like age or gender, is readily determinable from the public record. Moreover, when, as here, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. The marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. Finally, a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often it involves only the presentation of a



certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case, for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript. This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-like proceeding at issue in *Bullington*.

Even when, as here, the prior conviction trial involves some factual point relating to the prior crime, such as whether the defendant acted personally, the proceeding is not like "the trial on guilt" (*Bullington, supra*, 451 U.S. at p. 439), because the prosecution may only present evidence from the *record* of the prior conviction (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*)). The defendant, and any member of the public, can review that record before the prior conviction trial and accurately forecast the trial's outcome. When a trial, even a very important trial, is short and readily predictable in this way, the defendant suffers correspondingly less embarrassment, expense, and anxiety. Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. For these reasons, we conclude the financial and emotional burden of a prior conviction trial is minor as compared to a guilt trial. (Cf. *DiFrancesco, supra*, 449 U.S. at p. 136 ["The defendant's primary concern and anxiety obviously relate

to the determination of innocence or guilt, and that already is behind him."].)

Third, the nature of the issues involved at the penalty phase of a capital trial distinguishes *Bullington* from this case. The sentence determination in a capital case necessarily depends on the specific facts of the defendant's present crime, as well as an overall assessment of the defendant's character. The evidence usually overlaps or supplements the evidence offered at the guilt phase of the trial. On the other hand, in a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all. Like a trial in which the defendant's age or gender is at issue, the prior conviction trial merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant (*People v. Biggs* (1937) 9 Cal.2d 508, 512; *People v. Dutton* (1937) 9 Cal.2d 505, 507), even if a prior jury has rejected the allegation (*People v. Rice* (1988) 200 Cal.App.3d 647, 654-656). If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. (*Ibid.*) "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." (*Durham v. State* (Ind.1984) 464 N.E.2d 321, 324.)

Given these distinctions, we do not believe *Bullington* requires application of the double jeopardy clause to all sentencing proceedings that have "the hallmarks of the trial on guilt or innocence." (*Bullington, supra*, 451 U.S. at p. 439.) Nevertheless, other state courts and the federal

circuit courts are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here. Some courts conclude that, where the prior conviction determination involves a trial-like proceeding at which the prosecution has the burden of proving certain disputed facts, a negative finding is tantamount to an acquittal of the facts necessary to establish a longer sentence, and double jeopardy protections bar retrial. (See, e.g., *Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109, 113, revd. on other grounds in *Caspari, supra*, 510 U.S. at pp. 396-397; *Durosko v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *Briggs v. Procunier* (5th Cir. 1985) 764 F.2d 368, 371; *People v. Quintana* (Colo.1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514; *State v. Hennings* (1983) 100 Wn.2d 379, 386-390 [670 P.2d 256, 259-262].) These courts, however, do not fully appreciate the unique nature and constitutional origins of capital sentencing proceedings as compared to prior conviction proceedings. Accordingly, we find more persuasive those decisions involving noncapital sentencing proceedings in which courts found the federal double jeopardy clause did not apply. (See, e.g., *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1274 ["We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."]; *Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144, 148 ["We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376 [The habitual criminal proceeding "is an inquiry as to

whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."]; *Durham v. State, supra*, 464 N.E.2d at p. 324 ["The habitual offender status . . . is a continuing status of a particular defendant. . . . The state may use this status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."]; *State v. Cobb* (Mo. 1994) 875 S.W.2d 533, 536 ["The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."]; *State v. Aragon* (1993) 116 N.M. 267, 271 [861 P.2d 948, 952] ["Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."]; cf. *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451, 456 ["[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."]; *U.S. v. Rodriguez-Gonzalez* (2d Cir. 1990) 899 F.2d 177, 181 ["Reliance on . . . *Bullington* is inapposite. . . . since [that] case[ ] arose in the unique context of capital sentencing."]; *People v. Levin* (Ill. 1993) 623 N.E.2d 317, 325 ["We conclude that the separate hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."]; *People v. Sailor* (1985) 65 N.Y.2d 224, 231-236 [480 N.E.2d 701, 708]



["[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender. . . ."]; but see *Perkins v. State* (Ind.1989) 542 N.E.2d 549, 551-552 [overruling *Durham v. State*, *supra*, 464 N.E.2d 321, but relying on a clear misreading of *Lockhart v. Nelson* (1988) 488 U.S. 33, 37-38, fn. 6].)

Our conclusion finds some support in the high court's most recent discussion of the issue in *Caspari*, *supra*, 510 U.S. 383. In *Caspari*, as in this case, the state court of appeals reversed a sentence because the record contained insufficient evidence that the defendant was a "persistent offender." (*id.* at pp. 386-387.) On remand, the prosecution offered additional evidence, and the trial court imposed the same sentence. The state court of appeals affirmed the sentence, concluding that the federal double jeopardy clause does not apply to sentencing proceedings and therefore did not bar retrial of the persistent offender issue. (*State v. Bohlen* (Mo.1985) 698 S.W.2d 577, 578.) The defendant subsequently petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but the federal court of appeals reversed, holding that the double jeopardy clause does apply to noncapital sentencing proceedings. The Supreme Court granted certiorari. (*Caspari*, *supra*, 510 U.S. at pp. 387-388.)

In deciding *Caspari*, the Supreme Court applied *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*), which held that new rules of constitutional law do not generally apply retroactively so as to permit reopening of final convictions by way of habeas corpus petitions. The *Caspari* court

reasoned that, if application of the federal double jeopardy clause to noncapital sentencing proceedings would constitute a "new constitutional rule of criminal procedure" that would "break[ ] new ground or impose[ ] a new obligation on the States" (*Teague*, *supra*, 489 U.S. at pp. 299, 301 (plur. opn. of O'Connor, J.)), then the district court correctly denied the writ of habeas corpus. (*Caspari*, *supra*, 510 U.S. at p. 390.) The court noted its historic refusal to apply the double jeopardy clause to sentencing proceedings, with the only exception being capital sentencing proceedings such as the one at issue in *Bullington*. (*Caspari*, *supra*, 510 U.S. at pp. 391-392.) The court then compared sentencing proceedings in noncapital cases to those in capital cases. Noting that sentencing in a capital case is unique and that procedural safeguards apply in capital cases that do not apply in other cases (*id.* at pp. 392-393), the court concluded "that the [federal] Court of Appeals announced a new rule in this case" by extending *Bullington* to noncapital cases (*Caspari*, *supra*, 510 U.S. at p. 395). Accordingly, the defendant's sentence was "'consistent with established constitutional standards'" as of the time the sentence became final (*Teague*, *supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.), quoting *Desist v. United States* (1969) 394 U.S. 244, 262-263 (dis. opn. of Harlan, J.)), and the federal court of appeals erred in directing the district court to grant the writ (*Caspari*, *supra*, 510 U.S. at pp. 396-397).

Given this conclusion, the high court declined to decide whether the double jeopardy clause applies to noncapital sentencing proceedings. (*Caspari*, *supra*, 510 U.S. at p. 397.) Nevertheless, the court confirmed that none of its decisions applies the clause in that context.

Indeed, the court asserted that "a reasonable jurist reviewing our precedents" would not conclude otherwise. (*id.* at p. 393.) Thus, though we do not know how the Supreme Court would resolve the issue now before us, we do know that, like the sentence imposed in *Caspari*, the sentence here is "'consistent with established constitutional standards.'" (*Teague, supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)) Furthermore, *Caspari* highlights the basic flaw of the dissent's reasoning. The premise of the dissent is that *Bullington* requires application of the federal double jeopardy clause whenever a sentencing proceeding, whether capital or noncapital, has "the hallmarks of the trial on guilt or innocence." (*Bullington, supra*, 451 U.S. at p. 439.) The Missouri persistent offender statutes at issue in *Caspari*, like section 1025, created a proceeding with all these "hallmarks," including proof beyond a reasonable doubt. (*Bohlen v. Caspari, supra*, 979 F.2d at pp. 112-113.) If the dissent's articulation of *Bullington's* holding were correct, then the Court of Appeals' decision in *Caspari*, barring retrial of the persistent offender issue, would have constituted a straight application of established precedent. The high court would not have found that retrial was "'consistent with established constitutional standards'" (*Teague, supra*, 489 U.S. at p. 306 (plur. opn. of O'Connor, J.)), and the high court would not have concluded "that the Court of Appeals announced a new rule in this case." (*Caspari, supra*, 510 U.S. at p. 395.) In light of *Caspari*, *Bullington* simply does not dictate the result in this case.

Finally, the *Caspari* court suggested that, if faced with the issue, it would find the double jeopardy clause inapplicable to the sentencing determination involved here.

"Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence." (*Caspari, supra*, 510 U.S. at p. 396.)

In conclusion, we hold that the federal double jeopardy clause does not apply to the trial of the prior conviction allegation in this case.

Of course, in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, footnote 22, we applied double jeopardy protections to bar retrial of a sentence-enhancing allegation in a noncapital case, saying: "The jury's rejection [of the allegation] constituted an express acquittal on the enhancement and forecloses any retrial." In *Marks*, we relied primarily on the Court of Appeal decision in *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, which in turn relied on *People v. Henderson* (1963) 60 Cal.2d 482 and *People v. Collins* (1978) 21 Cal.3d 208. *Henderson*, which we reaffirmed in *Collins*, held that, when a defendant successfully challenges his conviction, the state double jeopardy clause prohibits imposition of a greater sentence following retrial, thus preventing an "unreasonabl[e] impair[ment]" of "[a] defendant's right of appeal from an erroneous judgment." (*People v. Henderson, supra*, 60 Cal.2d at p. 497; see also *People v. Collins, supra*, 21 Cal.3d at p. 216; *People v. Hood* (1969) 1 Cal.3d 444, 459; *People v. Ali* (1967) 66 Cal.2d 277, 281.) Our



reference in *Marks* to "an express acquittal on the enhancement" might suggest a broader holding than mere application of *Henderson* and its progeny, but because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 914, fn. 4 [stating the policy underlying *Henderson* as a reason for barring retrial of enhancements].)<sup>2</sup> Because we based our decision in *Marks* on an interpretation of the California Constitution that is not relevant here, *Marks* has no bearing upon our interpretation of the federal Constitution.

#### California Constitution

We must also determine whether the double jeopardy protection of the California Constitution bars retrial of the prior conviction allegation in this case. The state Constitution provides that "[p]ersons may not twice be put in jeopardy for the same offense." (Cal. Const., art. I, § 15.) By comparison, the federal Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., 5th Amend.) The "California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution. . . ." (*People v. Fields* (1996) 13 Cal.4th 289, 298.) Nevertheless, when we interpret a provision of the California Constitution that

<sup>2</sup> Whether *Marks* correctly applied the *Henderson* rule is not before us.

is similar to a provision of the federal Constitution, " 'cogent reasons must exist' " before we will construe the Constitutions differently and " 'depart from the construction placed by the Supreme Court of the United States.' " (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.)

The purpose behind the state and federal double jeopardy provisions is the same. Like decisions interpreting the federal double jeopardy clause, "[d]ecisions under the double jeopardy clause of the California Constitution . . . recognize the defendant's interest in avoiding both the stress of repeated prosecutions and the enhanced risk of erroneous conviction." (*People v. Fields, supra*, 13 Cal.4th at p. 298.) In certain contexts, this court has decided that, in furthering this purpose, the state double jeopardy clause provides greater protection than its federal counterpart. The rule, which we already discussed, protecting defendants from receiving a greater sentence if reconvicted after a successful appeal (see *People v. Collins, supra*, 21 Cal.3d at p. 216; *People v. Hood, supra*, 1 Cal.3d at p. 459; *People v. Ali, supra*, 66 Cal.2d at p. 281; *People v. Henderson, supra*, 60 Cal.2d at pp. 495-497) is one instance where we have interpreted the state double jeopardy clause more broadly than the federal clause. (Cf. *Pearce, supra*, 395 U.S. at pp. 719-721 [finding no violation of the federal double jeopardy clause under similar circumstances].) A second instance is the rule prohibiting retrial after the trial court has declared a mistrial without the defendant's consent. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-718; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275-276; cf. *Gori v. United States* (1961) 367

U.S. 364, 365 [finding no violation of the federal double jeopardy clause under similar circumstances].)

Under the circumstances of the present case, we find no reason to construe the California Constitution to afford greater protection than the federal Constitution. As we described above, though the effect on a defendant's sentence may be significant, the embarrassment, expense, and anxiety of trying a prior conviction allegation are relatively minor, and the risk of an erroneous result is slight. The primary source of embarrassment is the defendant's present offense, not an allegation of a prior conviction. The trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable. We see no reason, in the present context, to interpret the state Constitution differently from the federal. (Cf. *People v. Saunders, supra*, 5 Cal.4th at p. 596.) Accordingly, we conclude that the double jeopardy provision of the state Constitution does not apply to the trial of the prior conviction allegation in this case. (Cf. *People v. Morton* (1953) 41 Cal.2d 536 [permitting retrial of a prior conviction allegation under facts similar to those here, but without discussing double jeopardy].)

#### CONCLUSION

We conclude that the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case. Of course, this conclusion raises numerous secondary issues. For example, the Court of Appeal's determination that the evidence was insufficient to prove defendant's prior conviction was of a serious felony is, at the very least, the law of this case.

Thus, the prosecution would have to present additional evidence at a retrial of the prior conviction allegation in order to obtain a different result. What limitations might apply to this additional evidence (other than the limitations we identified in *People v. Reed, supra*, 13 Cal.4th 217, and *Guerrero, supra*, 44 Cal.3d 343), we do not decide, because the Court of Appeal did not address that issue. For the same reason, we express no opinion about whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints. Finally, we express no opinion about whether due process protections preclude the prosecution from retrying the prior conviction allegation. (Cf. *Pearce, supra*, 395 U.S. at pp. 723-724; *Blackledge v. Perry* (1974) 417 U.S. 21, 28-29.)

Because the state and federal double jeopardy protections do not apply to the trial of the prior conviction allegation in this case, we reverse the judgment of the Court of Appeal to the extent it barred retrial of that allegation on double jeopardy grounds.

CHIN, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

---



COPY

THE PEOPLE v. ANGEL JAIME MONGE

S055881

## CONCURRING OPINION BY BROWN, J.

I concur in the result, although I would favor a more cautious approach. The double jeopardy clause has proven singularly difficult to apply and remains one of the most " 'misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion.' " (Westen & Drubel, *Toward a General Theory of Double Jeopardy* (1978) Sup.Ct. Rev. 81, 82, fn. 6.)

While acknowledging that its precedents could hardly be characterized as "models of consistency and clarity" (*Burks v. United States* (1978) 437 U.S. 1, 9), the United State Supreme Court has held the prosecution is not entitled to retrial when a conviction is reversed for insufficient evidence. (*id.* at pp. 9-11.) The question in this case is whether the prosecution is similarly barred from retrying a prior-conviction-sentence enhancement allegation when the true finding is reversed for insufficient evidence.

This is a question the high court has never specifically addressed. (*Bullington v. Missouri* (1981) 451 U.S. 430, 445; *Caspari v. Bohlen* (1994) 510 U.S. 383, 397.) In *Bullington*, the court considered whether the double jeopardy clause barred the prosecution from seeking the death penalty on retrial following reversal of an earlier conviction imposing a lesser penalty. *Bullington* marked

the first time the court had applied the double jeopardy clause to a sentencing determination. (*Bullington v. Missouri, supra*, at p. 438.)

*Bullington's* characterization of the first jury's decision to impose life imprisonment as an acquittal of " 'whatever was necessary to impose the death sentence' " (*Bullington v. Missouri, supra*, 451 U.S. at p. 445, quoting *State ex rel. Westfall v. Mason* (Mo.Sup.Ct.1980) 594 S.W.2d 908, 922 (dis. opn. of Bardgett, C.J.)), is strongly reminiscent of the court's decision in *Green v. United States* (1957) 355 U.S. 184. In *Green*, the court held the double jeopardy clause barred retrial of a greater offense after the jury at the defendant's first trial convicted him of the lesser included offense. (*id.* at p. 191.) In both settings, the failure of the prosecution to prove its greatest charge implicated a failure to prove the case-in-chief. Characterizing the failure of proof as an acquittal under these circumstances is fully consistent with the objectives of the double jeopardy clause in that it protects a defendant charged with a crime from being forced to "run the gantlet . . . on that charge" (*id.* at p. 190) more than once.

While the United States Supreme Court's cases have not "foreclosed the application of the Double Jeopardy Clause to noncapital sentencing" (*Caspari v. Bohlen, supra*, 510 U.S. at p. 393), none has applied the clause in that particular context, and the question remains unresolved. In the wake of *Bullington* and *Caspari* considerable confusion exists, but a few propositions seem clear. First, the double jeopardy clause does apply to some sentencing proceedings; second, where the clause applies, its sweep is absolute and there can be no balancing of the equities; and finally, application of double jeopardy does not

depend on the mechanical application of a formula. It depends instead on the nature of the determination to be made and its relationship to the underlying offense.

As the court stated in *Caspari*: "Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair, and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence." (*Caspari v. Bohlen*, *supra*, 510 U.S. at pp. 396-397.)

Other jurisdictions have found the reasoning of *Bullington* inapplicable where the facts at issue in the sentencing determination have no bearing on facts relating to the present crime. (*Denton v. Duckworth* (7th Cir. 1989) 144, 148 [unlike death penalty determination in *Bullington*, habitual offender statute does not require consideration of facts underlying substantive offense]; *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 375 [same]; *People v. Sailor* (N.Y.App. 1985) 480 N.E.2d 701, 707 [*Bullington* implicitly recognizes death penalty was part of substantive offense of murder].)

When the prosecutor fails to prove a prior conviction allegation, a retrial does not require a factfinder to reevaluate the evidence underlying the substantive offense. Under these circumstances a retrial does not subject a defendant to the risk of repeated prosecution within the meaning of the double jeopardy clause.

BROWN, J.

---

COPY

PEOPLE v. MONGE

S055881

#### DISSENTING OPINION BY WERDEGAR, J.

I dissent. With due respect, I believe the majority fails to appreciate the import of the United States Supreme Court decisions touching on this difficult issue, especially the meaning of *Bullington v. Missouri* (1981) 451 U.S. 430 (hereafter sometimes *Bullington*). As I explain, *Bullington* and its progeny compel a conclusion that the federal double jeopardy clause precludes the People from retrying the prior felony conviction allegation in this case. Moreover, even assuming the federal double jeopardy clause does not apply here, I conclude the double jeopardy clause of the state Constitution (Cal. Const., art. I, § 15) protects Californians from multiple retrials of sentence enhancement allegations, at least as the statutory law concerning such enhancement allegations is now written.

#### I. DOUBLE JEOPARDY UNDER THE FEDERAL CONSTITUTION

As the majority correctly recognizes, "the Supreme Court has never held that the double jeopardy clause applies generally to proceedings, like the one in this case, to determine whether a defendant should receive a longer sentence because of prior convictions." (Lead opn., *ante*, p.5; conc. opn. of Brown, J., *ante*, p.1 ["This is a question the high court has never specifically addressed."].) The persuasive force of this observation, however, is diminished by the fact the high court also has never held the



reverse, i.e., it has never held the double jeopardy clause is inapplicable to all noncapital sentencing proceedings. Just as we have avoided resolving this issue (*People v. Valladoli* (1996) 13 Cal.4th 590, 608 [assuming without deciding double jeopardy protections apply to prior conviction enhancement allegations]; *People v. Wiley* (1995) 9 Cal.4th 580, 593, fn.8 [need not decide the issue]), the United States Supreme Court has similarly managed to avoid a definitive decision on the issue. The most recent example of this avoidant behavior is *Caspari v. Bohlen* (1994) 510 U.S. 383 (hereafter *Caspari*), in which the high court explained that "[b]ecause of our resolution of this case on Teague<sup>1</sup> grounds, we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing. . . ." (*Caspari*, *supra* at p. 397 [127 L.Ed.2d at p. 250]; see also *Lockhart v. Nelson* (1988) 488 U.S. 33, 37, fn.6 [because state conceded the issue, court "assume[d], without deciding" double jeopardy applied to noncapital sentencing proceedings]; *Hunt v. New York* (1991) 502 U.S. 964 (opn. by White, J. dis. from den. of cert.) [arguing high court should grant certiorari to resolve split in authority concerning the "key question . . . whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in noncapital cases"].) As I explain, although the slate is not entirely a clean one, the majority misapprehends the importance of *Bullington*, *supra*, 451 U.S. 430, and its progeny.

<sup>1</sup> See *Teague v. Lane* (1989) 489 U.S. 288, governing the retroactivity of newly-announced rules to cases proceeding via habeas corpus in the federal courts.

I begin with first principles. The Fifth Amendment provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This provision was made applicable to the states through the Fourteenth Amendment by the Supreme Court's decision in *Benton v. Maryland* (1969) 395 U.S. 784. The federal double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717, fn. omitted.) "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.)

The general rule is that the federal double jeopardy prohibition does not operate to prevent a retrial following reversal of the judgment on appeal. (*North Carolina v. Pearce*, *supra*, 395 U.S. at pp. 719-720; *United States v. Tateo* (1964) 377 U.S. 463, 465.) An important exception to this general rule, however, applies when the judgment is reversed for insufficient evidence. (*Burks v. United States* (1978) 437 U.S. 1 [hereafter *Burks*].) In such cases, retrial is barred by the federal double jeopardy clause because "the prosecution . . . has been given one fair opportunity

to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (*Id.*, at p. 16.) Inasmuch as *Burks* delineates the scope of federal constitutional law, we have consistently followed the rule set forth in that case. (See *People v. Trevino* (1985) 39 Cal.3d 667, 694-699, disapproved on another ground, *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1221; *People v. Belton* (1979) 23 Cal.3d 516, 526-527 & fn. 13; see generally 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 319(b), pp. 368-369 ["The *Burks* rule has been adhered to by the California courts"].)

The Court of Appeal in this case reversed the jury's finding on the alleged prior serious felony conviction, explaining the People failed to produce sufficient evidence defendant personally inflicted great bodily injury or personally used a weapon in the prior crime. This was not a reversal for mere trial error such as the erroneous admission or exclusion of evidence at trial. Instead, the appellate court's action was a reversal for insufficient evidence. If the federal double jeopardy clause applies to sentence enhancements generally, or to the particular enhancement at issue in this case (i.e., Pen. Code, §§ 667, subds. (b)-(i) [legislative "Three Strikes" law], 1170.12, subds. (a)-(d) [initiative "Three Strikes" law]), the *Burks* rule would prohibit retrial of the enhancement allegation.

The lead opinion reasons the *Burks* rule does not apply, finding the federal double jeopardy clause inapplicable to sentencing hearings unless the death penalty is involved. As I explain, the lead opinion's reading of applicable Supreme Court precedent is flawed.

The lead opinion is correct that double jeopardy protections do not apply to traditional criminal sentencing proceedings. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." (*United States v. DiFrancesco* (1980) 449 U.S. 117, 133 [hereafter *DiFrancesco*].) Most recently, the high court explained that "[t]raditionally, '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.' *Nichols v. United States*, 511 U.S. 738, 747; 128 L.Ed.2d 745[, 754] (1994). We explained in *Williams v. New York*, 337 U.S. 241, 246 (1949), that 'both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' " (*Witte v. United States* (1995) 515 U.S. 389, 397-398 [132 L.Ed.2d 351, 362-363].) "Against this background of sentencing history, we specifically have rejected the claims that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime." (*Id.*, at p. 398 [132 L.Ed.2d at p. 363].)



We, of course, have such "traditional" sentencing proceedings in California. Following the jury's verdict, the trial court must set a hearing within 20 judicial days of verdict for pronouncement of judgment. (Pen. Code, § 1191.) At this hearing, the trial judge considers the probation report (see Cal. Rules of Court, rules 411 [presentence investigations and reports], 411.5 [probation officer's presentence investigation report]) and exercises broad discretion in deciding whether probation is justified as a sentencing option (*Id.*, rule 414 [criteria affecting probation]), in selecting the base term (*Id.*, rule 420) and in choosing whether to impose concurrent or consecutive terms (*Id.*, rule 425 [criteria affecting concurrent or consecutive sentences]). In making these determinations, the trial judge considers the circumstances in aggravation (*Id.*, rule 421) and in mitigation (*Id.*, rule 423), which need not be either pleaded or proved by the People. (See generally, *People v. Hernandez* (1988) 46 Cal.3d 194, 204-206 [noting difference between "a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed"]; *People v. Betterton* (1979) 93 Cal.App.3d 406 ["full panoply of rights" not required in sentencing hearing]; *People v. Thomas* (1979) 87 Cal.App.3d 1014 [Cal. Rules of Court intended to guide sentencing courts, not give notice of prohibited acts].) In most cases, the number of potential sentencing dispositions and permutations is great, as is the discretion of the sentencing judge. Such "traditional" sentencing proceedings are not at issue in this case, and I agree double jeopardy principles do not apply to proceedings of this type.

As is apparent, "traditional" sentencing proceedings are held without a jury, permit consideration of probation reports and involve broad sentencing court discretion to choose among a variety of outcomes. Such hearings must be distinguished from the type of criminal sentencing hearing that follows the trial on the substantive criminal offenses and is addressed typically (but not exclusively) to the existence of enhancements. In this latter type of hearing, formal notice of the sentence enhancement allegation must be given, a jury determines historical facts that can lead to enhanced or longer sentences, the People bear the burden of proof beyond a reasonable doubt by admissible evidence, and the sentencer must choose one of two outcomes. This latter type of sentencing hearing constitutes a separate trial or a "trial-like" proceeding on punishment. As I explain, the lesson of *Bullington v. Missouri*, *supra*, 451 U.S. 430, and its progeny is that in such cases, federal double jeopardy protections apply.

#### A. *Bullington* and its Progeny

*Bullington* involved a defendant convicted in Missouri of capital murder. Under Missouri law, the defendant in *Bullington* was entitled to a separate presentence hearing on the question of penalty. State law guaranteed him the following procedural rights at that hearing: the same jury that found him guilty of murder would hear additional evidence; notice of the aggravating evidence must be given; the jury must consider 10 aggravating and 6 mitigating factors specified by law; the jury must weigh the various factors and identify in writing which factors it found proved beyond a reasonable doubt; the jury must find that the aggravating evidence warrants imposition of

the death penalty beyond a reasonable doubt; and the jury's decision must be unanimous. (*Bullington, supra*, 451 U.S. at pp. 433-434.) After a presentence hearing, the jury eschewed the death penalty and imposed on the defendant a sentence of life with no parole for 50 years.

The defendant in *Bullington* then moved for judgment of acquittal or for a new trial. When the trial court granted the new trial motion, the prosecution announced its decision that, during the retrial, it would again seek the death penalty. The defendant objected, citing the federal double jeopardy clause, and the high court agreed. The Supreme Court first noted that it "has resisted attempts to extend [double jeopardy principles] to sentencing. The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." (*Bullington, supra*, 451 U.S. at p. 438.) For this proposition, the high court cited the cases on which the lead opinion relies, i.e., *North Carolina v. Pearce, supra*, 395 U.S. 711, *DiFrancesco, supra*, 449 U.S. 117, *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, *Stroud v. United States* (1919) 251 U.S. 15 (hereafter *Stroud*).

The *Bullington* court declined, however, to follow this line of reasoning. Because its explanation for diverging from the previous rule is critical to this case, I quote it extensively:

"The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was *not given unbounded discretion* to select appropriate punishment from a wide range authorized by statute. Rather, a *separate hearing was required* and was held, and the jury was presented both a *choice between two alternatives and standards to guide the making of that choice*. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the *burden of establishing certain facts beyond a reasonable doubt* in its quest to obtain the harsher of the two alternative verdicts. *The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.*

"In contrast, the sentencing procedures considered in the Court's previous cases *did not have the hallmarks of the trial on guilt or innocence*. In *Pearce*, *Chaffin* and *Stroud*, there was no separate sentencing proceeding at which the prosecution was required to prove – beyond a reasonable doubt or otherwise – additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud*, no standards had been enacted to guide the jury's discretion. In *Pearce*, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in *Chaffin*, the discretion given to the jury was extremely broad. That



defendant, convicted in Georgia of robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. [Citation.] The statute contained no standards to guide the jury's exercise of its discretion." (*Bullington, supra*, 451 U.S. at pp. 438-440, italics added, fns. omitted.)

"In the usual sentencing proceeding, however, it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' In the normal process of sentencing, 'there are virtually no rules or tests or standards - and thus no issues to resolve. . . . ' M. Frankel, *Criminal Sentences: Law Without Order* 38 (1973). Thus, '[t]he discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance. Where the judge has power to select a term of imprisonment within a range the exercise of that authority is left fairly at large.' Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 *Harv.L.Rev.* 904, 916 (1962)." (*Bullington, supra*, 451 U.S. at pp. 443-444, fn. omitted.)

"By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' . . . [W]e therefore refrain from extending the rationale of *Pearce* to the very different facts of the present case. Chief Justice Burger, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death

sentence.' 594 S.W.2d, at 922. We agree." (*Bullington, supra*, 451 U.S. at pp. 444-445, italics added.) "Having received 'one fair opportunity to offer whatever proof it could assemble,' [citation], the State is not entitled to another." (*Id.*, at p. 446, quoting *Burks, supra*, 437 U.S. at p. 16.)

As is clear, the high court found *Bullington* distinguishable from prior cases because of the nature of the sentencing proceeding involved. Unlike past cases, the separate sentencing proceeding in *Bullington* bore "the hallmarks of the trial on guilt or innocence" (451 U.S. at p. 439), including the right to a jury, notice to the defendant of the facts to be proved, the submission of evidence and presentation of argument, a sentencing choice between two alternatives, circumscribed discretion with standards to guide such discretion, and a requirement of jury unanimity and of proof beyond a reasonable doubt.

The Supreme Court followed *Bullington* three years later in *Arizona v. Rumsey* (1984) 467 U.S. 203 (hereafter *Rumsey*). In *Rumsey*, the defendant was convicted of armed robbery and first degree murder. The trial judge, without a jury, found no aggravating circumstances present and thus determined the appropriate sentence under state law was life imprisonment without the possibility of parole for 25 years. On appeal, the Arizona Supreme Court found the trial judge had been mistaken in concluding no aggravating circumstance existed and remanded for a new sentencing hearing. Following the new hearing, the trial judge sentenced the defendant to the death penalty. On appeal once again, the defendant in *Rumsey* claimed imposition of the death sentence on retrial violated the federal double jeopardy clause as

interpreted in *Bullington, supra*, 451 U.S. 430. The state supreme court agreed and reduced the sentence to life imprisonment.

The United States Supreme Court granted Arizona's petition for a writ of certiorari and affirmed. The high court explained that "[t]he capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding *that make it resemble a trial* for purposes of the Double Jeopardy Clause. The sentencer – the trial judge in Arizona – is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision *guided by detailed statutory standards* defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance and no mitigating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves *the submission of evidence and the presentation of argument*. The usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. [Citations.] As the Supreme Court of Arizona held, these characteristics make the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri. [Citation.]" (*Rumsey, supra*, 467 U.S. at pp. 209-210, italics added.)

The court in *Rumsey* thus underscored *Bullington's* core holding that the federal double jeopardy clause will

apply to sentencing proceedings when such proceedings bear "the hallmarks of the trial on guilt or innocence" (*Bullington, supra*, 451 U.S. at p. 439). Stated differently, we must ask whether the sentencing proceeding involves characteristics "that make it resemble a trial for purposes of the Double Jeopardy Clause." (*Rumsey, supra*, 467 U.S. at pp. 209-210.) Despite the high court's analysis in both *Bullington* and *Rumsey*, the majority declines to follow the teaching of those cases. As I explain, the majority's approach is analytically insupportable.

#### B. Attempts at Distinguishing *Bullington* are Unpersuasive

The lead opinion acknowledges the existence of *Bullington, supra*, 451 U.S. 430, and its progeny, as well as that case's "hallmarks of the trial on guilt or innocence" analysis. (See lead opn., *ante*, p. 10.) The opinion declines to apply that analysis because it finds this case is distinguishable from *Bullington* and, accordingly, "*Bullington's . . . analysis does not apply here.*" (Lead opn., *ante*, p. 10.) First, the lead opinion contends the Supreme Court has suggested it would not apply *Bullington* to noncapital sentencing hearings. (Lead opn., *ante*, p. 10.) Second, aside from any perceived direction from the Supreme Court, the lead opinion finds it significant that "many of the procedural protections that apply in a [Penal Code] section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., *ante*, p. 11.) Additionally, the lead opinion finds the procedures applicable to capital cases "find no parallel" in noncapital cases (*ibid.*); the degree of mental anguish faced by a



criminal defendant subject to multiple prosecutions of enhancement provisions is insufficient to warrant double jeopardy protection (*id.*, p. 12); and capital sentencing proceedings are distinguishable because they rely on proof of facts linked to the facts of the substantive crimes (*id.*, pp. 13-14; see also conc. opn. of Brown, J., *ante*, p.3).

As I explain, any suggestions from the high court in post-*Bullington* cases are, at most, ambiguous. Nothing in *Bullington* itself suggests its analysis is limited to capital cases; more importantly, no Supreme Court case has ever held *Bullington* and its progeny are so limited. In addition, the distinction drawn by the lead opinion between statutory and constitutional protections is wholly unsupported; indeed, *Bullington* itself involved statutory procedural protections not mandated by the federal constitution. Finally, the lead opinion's attempt to distinguish *Bullington* and this case on their respective facts is wholly unpersuasive.

#### 1. *The Supreme Court has Never Held Bullington is Limited to Capital Cases*

The lead opinion asserts "the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases." (Lead opn., *ante*, p. 10, italics added; but see conc. opn. of Brown, J., *ante*, p. 2 [noting "this question remains unresolved"].) Any such "suggestion," of course, would not bind this court, which has an independent constitutional obligation to adjudicate the constitutional rights of litigants before it. Moreover, the two cases the lead opinion cites as making this "suggestion,"

*Caspari*, *supra*, 510 U.S. 383, and *Pennsylvania v. Goldhamer* (1985) 474 U.S. 28 (per curiam) (hereafter *Goldhamer*), are readily distinguishable.

In *Caspari*, *supra*, 510 U.S. 383, the high court confronted an Eighth Circuit Court of Appeals decision applying the *Bullington* analysis, in the context of a Missouri state prisoner's habeas corpus petition, to conclude prior felony convictions under Missouri's persistent offender statutes were subject to federal double jeopardy protections; thus, a state appellate court's reversal of the finding the petitioner was a persistent offender, due to insufficient evidence of the charged priors, barred retrial of the enhancement. (*Bohlen v. Caspari* (8th Cir. 1992) 979 F.2d 109.) The high court did not directly address the merits of this holding; instead, the court discussed whether the Eighth Circuit's decision applying double jeopardy protection to sentencing in a noncapital case was a new rule of law requiring prospective application only. (*Teague v. Lane*, *supra*, 489 U.S. 288.) It was in this context the Supreme Court noted that "Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." (*Caspari*, *supra*, at p. 392 [127 L.Ed.2d at p. 247].)

The *Caspari* court did not "hold" *Bullington* was limited to capital cases. Rather, it made the observation noted above merely to support its conclusion that "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents." (*Caspari*, *supra*, 510 U.S. at

p. 393 [127 L.Ed.2d at p. 248].) Noting that federal and state courts had "reached conflicting holdings on the issue" (*id.*, at p. 395 [127 L.Ed.2d at p. 249]), the court concluded "that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree' " (*ibid.*); accordingly, under *Teague v. Lane*, the Eighth Circuit erred in applying its ruling retroactively to defendant's benefit. Significantly for our purposes, the Supreme Court concluded its opinion in *Caspari* by stating: "*we have no occasion to decide whether the Double Jeopardy Clause applies to noncapital sentencing, or whether Missouri's persistent offender scheme is sufficiently trial-like to invoke double jeopardy protections.*" (*Caspari, supra*, at p. 397 [127 L.Ed.2d at p. 250], italics added.) As is clear, therefore, *Caspari* did not "hold" *Bullington* was limited to capital cases; more to the point, neither did the high court "suggest" it would so hold in the future. The court held only that it had not previously found *Bullington* applicable to noncapital cases, and so the Eighth Circuit's decision to do so for the first time in the context of a final conviction challenged by way of a petition for federal habeas corpus was improper.

*Goldhammer, supra*, 474 U.S. 28, presents similarly unimpressive evidence of a "suggestion" the high court would limit *Bullington* to capital cases. In that case, a per curiam opinion decided on summary disposition, the issue was whether, following a successful appeal by a defendant as to 34 of 112 counts of theft and forgery, the state was entitled to a remand for resentencing on other counts for which sentencing had been suspended. In

other words, the case did not concern sentence enhancement proceedings, capital or otherwise. In a passage quoting *DiFrancesco, supra*, 449 U.S. at page 134, *Goldhammer* noted: "the decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.'" (*Goldhammer, supra*, 474 U.S. at p. 30, italics added, brackets in original.)

It would be a mistake to draw any significant inferences from the bracketed phrase. *DiFrancesco* was decided one year before *Bullington* and, at that time, the general rule was indeed that the high court's "decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." (*DiFrancesco, supra*, at p. 134.) The Supreme Court in *Goldhammer* no doubt simply added the bracketed phrase to adjust the quotation to take into account the holding of *Bullington*. At the time *Goldhammer* was decided (1985), as now, the only two cases in which the high court has found a sentencing proceeding subject to the double jeopardy clause have been capital cases. (*Bullington, supra*, 451 U.S. 430; *Rumsey, supra*, 467 U.S. 203.) As we have explained, however, those cases did not turn on the fact the death penalty was involved.

*Caspari, supra*, 510 U.S. 383, and *Goldhammer, supra*, 474 U.S. 28, thus provide weak evidence at best for discerning whether the Supreme Court would apply *Bullington's* analysis to a noncapital case. Moreover, if we are attempting to predict what the high court *would hold* (as opposed to what it *has held*), we must also consider *Lockhart v. Nelson, supra*, 488 U.S. 33, a case involving a hearing to determine noncapital sentence enhancements



based on prior felony convictions. The *Lockhart* court "assume[d], without deciding," the double jeopardy clause applied to such proceedings. (*Id.*, at p. 37, fn. 6.) If the Supreme Court was of the opinion that *Bullington* was limited to capital proceedings, here was an opportunity to say so. If the court felt the double jeopardy clause was wholly inapplicable to sentencing proceedings not involving the death penalty, no reason appears to have decided *Lockhart* at all.

In any event, even assuming for argument *Caspari* and *Goldhammer* contain a "suggest[ion]" (lead opn., ante, p. 10) that the Supreme Court would not now apply the federal double jeopardy clause to noncapital sentencing proceedings, the simple fact is the high court has never actually "held" *Bullington* and *Rumsey* are so limited. Until directed otherwise by a definitive ruling, we are not bound by perceived "suggestions" in Supreme Court case law. We must decide the case before us based on constitutional principles, not predictions of what another court – even a higher court – may do if faced with a justiciable controversy. The Supreme Court having never held *Bullington* and *Rumsey* to be limited to capital cases, I would follow what several courts from around the country have done (see, e.g., *Bohlen v. Caspari*, supra, 979 F.2d 109, 113, revd. on other grounds in *Caspari*, supra, 510 U.S. 383; *Duroske v. Lewis* (9th Cir. 1989) 882 F.2d 357, 359; *People v. Quintana* (Colo. 1981) 634 P.2d 413, 419; *Cooper v. State* (Tex.Crim.App. 1982) 631 S.W.2d 508, 513-514 (hereafter *Cooper*); *State v. Hennings* (Wn.2d 1983) 670 P.2d 256, 259-262 (hereafter *Hennings*) and apply *Bullington's* "hallmarks of the trial on guilt or innocence" test to this

noncapital case to determine whether the federal double jeopardy clause applies here.

## 2. *It is Irrelevant that Defendant's Procedural Protections are Statutory Rather Than Constitutional*

The lead opinion next asserts it is "relevant" that "many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds." (Lead opn., ante, p. 11.) It is true that many of a criminal defendant's procedural rights in a trial of sentence enhancement allegations find their origins in either a statute or a decision of this court, and not in the Federal Constitution. For example, a trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon* (1994) 9 Cal.4th 69), and, whether or not the trial is bifurcated, the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancements must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c), 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court (Pen. Code, § 1025; see also Pen. Code, § 969½ [when prior conviction allegation is added to complaint after defendant has pleaded guilty, he must be arraigned on the allegations]). The People bear the burden of proving the sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566; see also, Pen. Code, § 1096 [applying standard of beyond a reasonable-doubt to "criminal actions"].)

Despite the nonconstitutional origins of these procedural protections, however, it is the lesson of *Bullington*, *supra*, 451 U.S. 430, that when a state erects a system in which sentence-enhancing facts are adjudicated in a hearing bearing "the hallmarks of the trial on guilt or innocence" (*id.*, at p. 439), the federal double jeopardy clause applies. Nothing in *Bullington* or its progeny suggests this analysis is dependent on whether the applicable procedural protections are constitutionally mandated. Indeed, in *Bullington* itself, the state of Missouri required procedural protections for its capital defendants that were not grounded in the federal Constitution. For example, Missouri law provided the jury must both designate in writing which aggravating factors it found true (Mo.Rev.Stat. § 565.012.4 (1978)) and apply a beyond a reasonable doubt standard to proof of those factors (*ibid.*; see *Bullington*, *supra*, 451 U.S. at p. 434). Neither procedural requirement is constitutionally mandated. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.) The lead opinion fails to account for this aspect of *Bullington*.

Accordingly, the lead opinion is simply wrong in claiming the constitutional nature of the protections involved is "relevant" (lead opn., *ante*, p. 11) to determining whether *Bullington's* analysis should apply here. Whether or not the procedural protections offered by a state for the adjudication of sentence-enhancing facts are constitutionally mandated is simply not a relevant consideration to the question before us.

### 3. *Bullington is Not Distinguishable from the Present Case*

The lead opinion next asserts that, any perceived "suggestion" in post-*Bullington* decisions aside, *Bullington* is substantively different from the present case, because it involved the death penalty, and "the trial-like procedures that regulate imposition of the death penalty find no parallel in noncapital cases." (Lead opn., *ante*, p. 11.) The lead opinion also finds *Bullington* distinguishable due to "the unique nature . . . of capital sentencing proceedings as compared to prior conviction proceedings." (Lead opn., *ante*, p. 15.) The lead opinion fails, however, to identify any persuasive reasons, in law or logic, why *Bullington* can or should be limited to capital cases.

Death is indeed different, for the state's execution of a human being as a penal sanction is both final and irreversible, modern society's most serious criminal penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (opn. of Burger, C.J.) [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plur. opn. by Stevens, J.) [because of finality and severity of the death penalty, "it is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].) For purposes of double jeopardy and applying *Bullington*, however, simply labeling the death penalty as "unique" or "different" obscures the pertinent



inquiry, namely, in what relevant way is the death penalty different for purposes of double jeopardy?<sup>2</sup>

Significantly, the *Bullington* court itself did not rely on the mere fact the death penalty was involved. Indeed, it declined to overrule *Stroud*, *supra*, 251 U.S. 15, a capital case in which a defendant, initially sentenced to life imprisonment, was sentenced to suffer the death penalty on retrial following a reversal and a new trial. The *Stroud* court found no double jeopardy prohibition against imposing the death penalty on retrial. Had *Bullington* held capital cases per se were different, it should have overruled *Stroud*. Instead, *Bullington* distinguished *Stroud* as a case in which the penalty trial – unlike the one in *Bullington* – was not one “like the trial on the question of guilt or innocence.” (*Bullington*, *supra*, 451 U.S. at p. 446.) “In *Stroud*, no standards had been enacted to guide the jury’s discretion.” (*Bullington*, *supra*, 451 U.S. at p. 439.) As the Supreme Court of Washington recognized: “Although *Bullington* involved the death penalty sentencing provision, neither the reasoning nor the holding in that case depends upon the presence of the death penalty.” (*Hennings*, *supra*, 670 P.2d 256, 260.) Clearly the mere presence of the death penalty is not the key here.

---

<sup>2</sup> As Justice Oliver Wendell Holmes observed, frequent repetition of an idea does not necessarily add to its logical force. “It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.” (*Hyde v. United States* (1912) 225 U.S. 347, 391 (dis. opn. of Holmes, J.).)

Nor can we say the trial-like procedures that governed Missouri’s capital sentencing proceedings are different in any meaningful way from the procedures governing the bifurcated sentencing proceeding used to determine the truth of the prior felony conviction allegation here. In both types of proceedings, the defendant may obtain a separate hearing, must be notified of what the People plan to prove, and is entitled to a jury and to counsel. In both types of proceedings, the trier of fact is guided by established standards and must choose one of two alternative verdicts. In the Missouri proceeding, the choices are death or life imprisonment without parole for 50 years. In the hearing in this case, the jury must decide whether the alleged prior conviction is true or untrue. Like the Missouri capital presentence hearing, the People in the present case are required to prove the alleged sentence enhancement beyond a reasonable doubt. As *Bullington* stated, “[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment. . . .” (*Bullington*, *supra*, 451 U.S. at p. 438.) Stated differently, the hearing on the prior felony conviction allegations bore “the hallmarks of the trial on guilt or innocence.” (*Id.*, at p. 439.)

Accordingly, the trial-like procedures that govern Missouri’s capital sentencing hearing are nearly identical to those that apply to the bifurcated proceeding held in this case to determine defendant’s prior felony convictions. I thus cannot agree with the lead opinion’s contrary conclusion that Missouri’s capital procedures “find no parallel in noncapital cases.” (Lead opn., *ante*, p. 11.)

The lead opinion also reasons that whereas *Bullington* held the relative level of embarrassment and anxiety a capital defendant would feel in facing a penalty phase trial was sufficiently comparable to the mental anguish suffered by a criminal defendant in the substantive guilt phase of a criminal trial (*Bullington, supra*, 451 U.S. at p. 445), the same cannot be said for a defendant facing a noncapital sentencing hearing. (Lead opn., *ante*, p. 12.) From this assessment of the emotional content of the trial experience, the lead opinion concludes *Bullington* should not be extended to noncapital sentencing proceedings.

What is missing from this discussion is a persuasive rationale supporting the bald assertion that a criminal defendant's "anxiety and insecurity" when facing a possible life sentence as a result of past crimes is not equivalent to that experienced by a defendant being tried for a substantive criminal offense. In this era of "Three-Strikes-and-You're-Out," the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial. Such prior convictions, if two or more are sustained, can lead to a *minimum* term in prison of twenty-five-years-to-life, with a maximum term consisting of the balance of the defendant's natural life. (Pen. Code, §§ 667, subd. (e)(2)(A)(i)-(iii), 1170.12 subd. (c)(2)(A)(i)-(iii).) Even if, as in this case, only one qualifying prior felony conviction is alleged, sustaining the prior conviction allegation will require the sentence be doubled in length, essentially adding as much time in prison as defendant received for committing the substantive offense. (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The lead opinion's

comparison of the mental anguish suffered by capital versus noncapital defendants is thus unconvincing.

Finally, the majority finds capital penalty trials are different in kind because the evidence presented in such hearings "usually overlaps or supplements the evidence offered at the guilt phase of the trial," whereas "in a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) Even if true, this proposed distinction finds no support in *Bullington* whatsoever. I note the majority fails to cite *Bullington* or, indeed, any authority, indicating this evidentiary factor has any relevance to a double jeopardy analysis.

Nor am I convinced the majority is correct as an empirical matter. Although "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding" is an aggravating circumstance in this state's death penalty scheme (see Pen. Code, § 190.3, factor (a)), and a defendant is entitled to argue lingering doubt as a mitigating circumstance (*People v. Sanchez* (1995) 12 Cal.4th 1, 77), penalty phase evidence is often untethered to the facts of the crime. Instead, such evidence frequently recounts the defendant's past violent criminal conduct and/or explains aspects of the defendant's upbringing or mental health history, evidence, in other words, that does not overlap with the evidence presented at the guilt phase of the trial.

Moreover, even in a bifurcated hearing on prior felony conviction allegations, the evidence must sometimes



establish some aspect of the present crime over and above the minimum necessary to obtain a guilty verdict on the substantive offense. For example, to impose a five-year enhancement term for a prior felony conviction pursuant to Penal Code section 667, subdivision (a), the People must not only prove the existence of a qualifying prior conviction, but must also prove *the present conviction* qualifies as a "serious felony" under section 1192.7, subdivision (c). (See *People v. Equarte* (1986) 42 Cal.3d 456 [for assault with a deadly weapon to qualify as "serious felony" eligible for enhancement, state must prove personal weapon use or personal infliction of bodily injury]; *People v. Thomas* (1986) 41 Cal.3d 837 [observing that for burglary to qualify as a "serious felony" eligible for enhancement, state must prove defendant personally used a gun or deadly weapon, or inflicted great bodily injury, or entered a residence].) In such a case, we cannot say "the factual determinations [at the separate hearing] are generally divorced from the facts of the present offense. . . ." (Lead opn., ante, p. 14; see also conc. opn. of Brown, J., ante, p. 3.)

In sum, the majority proffers no persuasive reason to support its assertion that *Bullington's* "hallmarks of the trial on guilt or innocence" test is limited to capital cases.

#### 4. *The Lead Opinion's Other Arguments are Unpersuasive*

The lead opinion announces other reasons for declining to apply the federal double jeopardy clause in this case, but none is persuasive. For example, the lead opinion asserts that "a criminal defendant is not entitled as a

federal constitutional matter to a trial, formal or informal, of sentencing issues, even when the sentence turns on factual determinations such as the existence of prior convictions." (Lead opn., ante, p. 5.) Because California thus could choose to provide *very few* procedural protections for sentencing allegations, reasons the lead opinion, it could certainly choose to provide less than full protection. From this, the lead opinion concludes "a trial of sentencing allegations *arguably* need not provide double jeopardy protection." (*Id.*, at p. 6, italics added.)

This argument is beside the point. While it may be true our Legislature could choose to provide fewer procedural protections for sentence enhancements (see *People v. Vera* (1997) 15 Cal.4th 269, 286 (dis. opn. of Werdegar, J.)), it has not done so. If anything, legislative action has moved in the opposite direction, ensuring a high degree of procedural protection for defendants charged with sentence-enhancing allegations. (See, e.g., Pen. Code, §§ 667, subd. (c) [prior convictions under legislative Three Strikes law must be "pled and proved"], 1170.12, subd. (a) [same under initiative Three Strikes law], 667.5, subd. (d) [prior prison term enhancements "shall not be imposed unless they are charged and admitted or found true"], 1025 [right to jury for prior felony conviction enhancements], 1102 [rules of evidence apply to criminal "actions"]; see also Pen. Code, § 190.3 [in penalty phase of capital case, evidence of prior criminal activity shall not be admitted "for an offense for which the defendant was prosecuted and acquitted"].)

The lead opinion also suggests federal double jeopardy cannot apply here because the Fifth Amendment specifically refers to "the offense," and "[t]he [double

jeopardy] clause makes no express reference to sentencing determinations." (Lead opn., *ante*, p. 7.) This argument is belied by *Bullington* itself, for the high court applied the federal double jeopardy clause to the Missouri capital sentencing trial although no "offense" was involved therein. Clearly any suggestion the federal double jeopardy clause is limited to criminal "offenses" is incorrect.

#### 5. Authority from the Federal Circuits and Other States

Citing several cases from the various federal circuits and other states, the majority admits these courts "are divided as to whether the federal double jeopardy clause applies to proceedings analogous to the one here." (Lead opn., *ante*, p. 14; see also conc. opn. of Brown, J., *ante*, p. 3.) As the lead opinion concedes, several federal circuits and state courts have profitably applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find the federal double jeopardy clause applicable to noncapital sentencing proceedings. For example, in *Briggs v. Proccunier* (5th Cir. 1985) 764 F.2d 368 (hereafter *Briggs*), Texas indicted the defendant for burglary and alleged two prior felony convictions which, if proved, required he be sentenced to life in prison. After a jury found the defendant guilty of the charged burglary, the state dismissed the charged prior convictions, citing proof problems. The defendant sought a new trial and the state joined the motion. When it was granted, the state again indicted the defendant for burglary. This time, however, the state charged two different prior felony convictions to enhance

the sentence. (*Id.*, at p. 369.) The prior felonies were found true and the defendant was sentenced to life imprisonment.

The Fifth Circuit Court of Appeals applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to reverse the district court's denial of relief on habeas corpus. "Like the death-sentencing procedure discussion in *Bullington v. Missouri*, 451 U.S. 430 (1981), the Texas scheme requires the state to prove at trial, beyond a reasonable doubt, the predicate facts, two prior convictions, necessary for the imposition of the harsher sentence. 'The two prior convictions must be alleged in the indictment, and upon review the allegations are treated the same as allegations of the elements of a substantive offense.' [Citation.] Therefore, if the state fails to introduce sufficient evidence of the defendant's status as an habitual offender at a first trial, the Double Jeopardy Clause prohibits the sentencing of the defendant as an habitual offender at a second trial." (*Briggs*, *supra*, 764 F.2d at p. 371.)

The Supreme Court of Washington reached the same conclusion in *Hennings*, *supra*, 670 P.2d 256. The defendant in *Hennings* was charged with robbery and with being an habitual criminal under Washington's habitual offender law. He ultimately pleaded guilty to robbery, but the trial court dismissed the habitual criminal charge, concluding the People failed to prove defendant's guilty plea in the prior conviction matter was knowingly and voluntarily obtained, a statutory requirement under Washington law. (*Id.*, p. 257.)



The Washington high court held double jeopardy precluded the People from recharging and retrying the habitual criminal allegation. The court explained that, like the capital proceeding at issue in *Bullington*, *supra*, 451 U.S. 430, an habitual offender determination under Washington law takes place in a separate proceeding in which the state bears the burden of proof beyond a reasonable doubt. In addition, should the allegation be proved, the range of penalties is strictly circumscribed: if the sentence is not suspended, the habitual offender must be sentenced to life imprisonment; there is no other sentence. (*Hennings*, *supra*, 670 P.2d at p. 258.) The "similarities [between *Bullington* and the Washington habitual offender law] indicate that under *Bullington* double jeopardy principles should apply to Washington's habitual criminal proceedings." (*Hennings*, *supra*, 670 P.2d at p. 260.)

As illustrated by *Briggs*, *supra*, 764 F.2d 368, and *Hennings*, *supra*, 670 P.2d 256, the majority rule that has emerged from the federal circuit courts and state high courts is this: *Bullington*'s "hallmarks of the trial on guilt or innocence" test is the applicable standard to determine whether noncapital sentencing proceedings are subject to the federal double jeopardy clause. As in *Briggs* and *Hennings*, many courts have found double jeopardy applies to bar retrial of a noncapital sentencing allegation because the state law at issue bore the hallmarks of a trial on guilt. (In addition to *Briggs*, *supra*, 764 F.2d 368 [5th Circuit], and *Hennings*, *supra*, 670 P.2d 256 [Washington], see, e.g., *Bohlen v. Caspari*, *supra*, 979 F.2d at p. 113, *revd.* on other grounds in *Caspari*, *supra*, 510 U.S. 383 [8th Circuit, interpreting Missouri habitual offender law];

*Nelson v. Lockhart* (8th Cir. 1987) 828 F.2d 446, 447-448, *revd.* on other grounds, *Lockhart v. Nelson*, *supra*, 488 U.S. 33 [interpreting Arkansas habitual offender law]; *Durosko v. Lewis*, *supra*, 882 F.2d at p. 359 [9th Circuit interpreting Arizona law]; *People v. Quintana*, *supra*, 634 P.2d at p. 419 [Colorado]; *Cooper*, *supra*, 631 S.W.2d at pp. 513-514 [Texas]; *Ex Parte Augusta* (Tex.Crim.App. 1982) 639 S.W.2d 481, 484 [following *Cooper*]; cf. *DeBussi v. State* (Miss. 1984) 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

Other courts have applied *Bullington*'s "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings to come to a contrary conclusion, i.e., that the sentencing law at issue did not bear sufficient similarity to a trial on the question of guilt. Accordingly, these courts have found double jeopardy did not prohibit a retrial under the particular statutory scheme at issue. For example, in *Wilmer v. Johnson* (3d Cir. 1994) 30 F.3d 451 (hereafter *Wilmer*), a challenge to a Pennsylvania drug trafficker sentence enhancement scheme, the appellate court applied the *Bullington* "hallmarks of the trial on guilt or innocence" test to find double jeopardy did not apply. Noting the state was permitted to appeal the sentence in the particular statutory sentencing scheme at issue, the *Wilmer* court concluded there would be no second "trial." More importantly, only a preponderance of the evidence test was applicable. "The lower standard of proof signifies a more lax procedure which in turn signifies that a hearing is not, in the *Bullington* calculus,

trial-like." (*Wilmer*, *supra*, 30 F.3d at pp. 457-458.) Contrary to the suggestion of the majority that *Wilmer* held double jeopardy could not apply to noncapital sentencing because of the absence of the death penalty, the *Wilmer* court applied *Bullington's* "hallmarks of the trial on guilt or innocence" test and concluded the state sentencing scheme at issue there was insufficiently analogous to a trial on guilt.

*People v. Levin* (Ill. 1993) 623 N.E.2d 317, which dealt with the Illinois habitual offender statute, also applied the *Bullington* analysis to a noncapital case before finding double jeopardy did not apply. "The legislature has fashioned the habitual-criminal sentencing proceeding to be less formalized than a trial. Indeed, the paucity of due process protections at sentencing supports the conclusion that the legislature has deemed the defendant's interests at this stage of the proceeding to warrant fewer of those protections than at trial. We conclude that the separate hearing procedure under our Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt." (623 N.E.2d at p. 325.) In other words, the separate hearing held pursuant to Illinois's habitual offender statute does not bear the hallmarks of a trial on guilt, so double jeopardy does not apply.

Other cases applying the *Bullington* "hallmarks of the trial on guilt or innocence" test to noncapital sentencing proceedings and finding such hallmarks absent include *Woodall v. United States* (8th Cir. 1995) 72 F.3d 77, 79-80 (interpreting federal Armed Career Criminal Act), *State v. Sowards* (Ariz. 1985) 709 P.2d 513, 515 (Arizona), *State v.*

*Cobb* (Mo. 1994) 875 S.W.2d 533, 535, hereafter *Cobb* (Missouri),<sup>3</sup> *Fitzpatrick v. State* (Mont. 1981) 638 P.2d 1002, 1017 (Montana), and *People v. Sailor* (1985) 491 N.Y.S.2d 112 (New York). (See also, *State v. Avila* (Ariz. 1985) 710 P.2d 440, 445-446 [quoting *Sowards* with approval]; cf. *State v. Ledbetter* (Conn. 1997) 692 A.2d 713, 717-718 [suggesting *Bullington* applies to state's noncapital persistent offender law, but concluding defendant waived the claim].) All of these cases recognize the applicable test in determining whether double jeopardy applies to bar retrial is whether the noncapital sentencing scheme bears sufficient similarity to a trial on guilt so that one can conclude, as in *Bullington*, that a not true finding operates as an "acquittal" of the sentencing allegation. (See, e.g.,

---

<sup>3</sup> Although the lead opinion cites this case in support, and admittedly some language in the *Cobb* opinion suggests the court found Missouri's noncapital persistent offender law distinguishable from the sentencing scheme in *Bullington* on the ground the Missouri law did not involve the death penalty, the Missouri Supreme Court also had this to say: "In the sentencing of a persistent offender, the trial court's discretion is essentially unfettered. The judge has a wide range of punishment from which to choose and is not inhibited by explicit standards imposed by statute. In addition, as in *DiFrancesco*, the choice presented the trial judge in sentencing persistent offenders is far broader than that faced by a jury in sentencing a defendant to death. For the same reasons that *Bullington* is distinguishable from *DiFrancesco*, *Pearce*, *Chaffin* and *Stroud*, *Bullington* is distinguishable from this case. Therefore, applying the rationale of *Bullington*, double jeopardy does not attach to Missouri's noncapital persistent offender sentencing." (*Cobb*, *supra*, 875 S.W.2d at p. 535.) It thus appears the *Cobb* court applied the *Bullington* analysis to conclude Missouri's persistent offender law did not bear the hallmarks of a trial on guilt or innocence.



*Woodall v. United States*, *supra*, 72 F.3d at p. 79 [emphasizing government's burden of proof is only by a preponderance of evidence to conclude double jeopardy does not apply].)

The majority's attempt (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3) to distinguish these cases wholesale as insufficiently impressed with the "unique nature and constitutional origins" of the death penalty is flawed, relying as it does on an unjustified embellishment of the Supreme Court's rationale in *Bullington*. Although *Bullington* involved a capital sentencing scheme, the mere possibility of the death penalty was not cited by the *Bullington* court as central to its rationale. As noted above, the Supreme Court of Washington has explicitly rejected the notion that *Bullington* was premised on the fact the death penalty was there involved. (See *Hennings*, *supra*, 670 P.2d at p. 260; see also *Linam v. Griffin* (10th Cir. 1982) 685 F.2d 369, 376-377 (conc. opn. of Anderson, J.) [fact death penalty was involved in *Bullington* was "not relied on nor even articulated by the Supreme Court as a basis for its holding"].) To the extent the majority relies on this "death-penalty-only" view of *Bullington*, it relies on an augmentation of that decision's rationale that appears nowhere in the body of the opinion itself.

The majority relies on cases which, admittedly, find *Bullington* does not apply to noncapital sentencing proceedings. In addition to espousing the minority rule, however, many of these cases employ faulty reasoning or announce their interpretation of *Bullington* in dicta. For example, in *State v. Aragon* (N.M. 1993) 861 P.2d 948, cited by the lead opinion in support (lead opn., *ante*, p. 15), the New Mexico Supreme Court found that double jeopardy

did not attach to New Mexico's habitual offender proceedings because the law does not create a substantive criminal offense. (See *id.*, pp. 950-951 ["we have determined that habitual offender proceedings do not involve a determination of guilt of *any offense*" (italics added)], 953 ["double jeopardy does not attach to the habitual offender proceeding . . . because . . . there was no prosecution of *an offense*" (italics added)].) This reasoning misreads *Bullington*, for, as explained, *ante*, the jury in the Missouri capital sentencing trial in *Bullington* also did not try a separate "offense." Instead, the *Bullington* jury was deciding between life or death as an appropriate sentence. Clearly, whether or not a sentencing scheme delineates an "offense" is not the test. Accordingly, *Aragon's* reasoning is flawed.

*Denton v. Duckworth* (7th Cir. 1989) 873 F.2d 144 (hereafter *Denton*), also cited by the majority in support (lead opn., *ante*, p. 15; conc. opn. of Brown, J., *ante*, p. 3), contains the same analytical flaw (873 F.2d at p. 147 [Indiana's habitual offender statute "*does not create a separate offense. . .*"], italics added), but is unpersuasive for a more basic reason. In *Denton*, the defendant was convicted of rape and was also found to be an habitual offender under Indiana law based on his conviction of four prior unrelated felonies. After his rape conviction, one of the four prior felony convictions was vacated by a different court. The state moved to retry the habitual offender allegation with the remaining three prior felony allegations (only two were necessary), deleting the now-vacated conviction. In these circumstances, the court held retrial was permissible.

*Denton* thus does not present a situation in which the state, with all its resources, failed to present sufficient evidence to convict. Instead, the matter was one of trial error for which the federal double jeopardy clause is inapplicable. (*Burks, supra*, 437 U.S. at pp. 15-16.) As even the *Denton* court opined: "This clearly is a case of 'trial error,' and not of insufficiency of the evidence." (*Denton, supra*, 873 F.2d at p. 148.) Any discussion in *Denton* of the application of *Bullington* was thus dictum.

*Linam v. Griffin, supra*, 685 F.2d 369, also declares its interpretation of *Bullington* in dictum. In *Linam*, the Tenth Circuit Court of Appeals found a state appellate court's reversal of a noncapital sentence enhancement "meets the *Burks* Court's definition of trial error and is not a true finding of inadequacy of evidence." (*Id.*, at p. 373.) Because only trial error was present in *Linam*, no double jeopardy bar to retrial applied irrespective of that court's views on *Bullington*. (See generally, *Bohlen v. Caspari, supra*, 979 F.2d at p. 114 [concluding *Linam* and *Denton* are distinguishable as cases involving trial error and not insufficiency of evidence]; *Carpenter v. Chapleau* (6th Cir. 1996) 72 F.3d 1269, 1276 (dis. opn. of Moore, J.) [finding *Denton's* and *Linam's* discussion of *Bullington* to be dictum].) The majority's reliance on dicta in *Denton, supra*, 873 F.2d 144, and *Linam, supra*, 685 F.2d 369, is thus misplaced.

The majority rule emerging from the federal circuit courts and the high courts from our sister states is this: the test to determine whether the federal double jeopardy clause applies to bar multiple retrials of noncapital sentencing determinations is *Bullington's* "hallmarks of the trial on guilt or innocence" test. The cases cited by the

majority in support of its contrary position delineate a minority rule, and are for the most part weakly reasoned or announce their interpretation of *Bullington* in dictum. Because I find the majority rule better reasoned and thus more persuasive, I would apply *Bullington's* "hallmarks of the trial on guilt or innocence" test to the facts of this case.

### C. Applying *Bullington* to This Case

*Bullington* found the federal double jeopardy clause applied to Missouri's capital sentencing hearing because that hearing bore the "hallmarks of the trial on guilt or innocence." The high court found it significant that the defendant enjoyed the right to a separate hearing and to a jury and that the jury was not granted broad discretion to choose an appropriate punishment, but was instead required to choose between two alternates authorized by statute. Perhaps most importantly, the prosecution bore the burden of establishing necessary facts beyond a reasonable doubt. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Bullington, supra*, 451 U.S. at p. 438.)

These same "hallmarks of the trial on guilt or innocence" apply to a trial on a sentence enhancement allegation. In such a hearing, the People bear the burden of proving the sentence enhancement beyond a reasonable doubt (*People v. Tenner, supra*, 6 Cal.4th at p. 566; see also,



Pen. Code, § 1096 [applying standard of beyond a reasonable doubt to "criminal actions"]), and the defendant is entitled to a jury (Pen. Code, § 1025). The sentence enhancement must be pleaded and proved (see, e.g., Pen. Code, §§ 667, subd. (c); 1170.12, subd. (a), 667.5, subd. (d)), and the defendant must answer the charge in open court. (Pen. Code, § 1025; see also Pen. Code, § 969<sup>1/2</sup> [requiring defendant be arraigned on a prior conviction allegation added to complaint after defendant has pleaded guilty].) The jury is limited to two alternatives (finding the allegation true or untrue) and is not authorized to choose among a wider array of sentencing choices. The trial court has discretion to order a separate hearing to determine the truth of the prior convictions (*People v. Calderon*, *supra*, 9 Cal.4th 69), but in any event, the defendant is entitled to a contested "trial" on the enhancement allegations, including the right to present evidence.

This "trial" on sentence enhancement allegations may be profitably contrasted with a "traditional" sentencing hearing, in which the People bear no burden of proof, the trial court can receive evidence from outside of court (such as a probation report), the trial court wields broad discretion to fashion a sentence appropriate to the defendant's crime, and, of course, a defendant has no right to a jury. As in *Bullington*, the "trial" on the sentence enhancement allegation is for all intents and purposes identical to the preceding trial on the question of the defendant's guilt or innocence of the substantive criminal charges. Under these circumstances, *Bullington* compels the conclusion the federal double jeopardy clause applies to this case to bar retrial of defendant's prior felony conviction sentence enhancement.

## II. DOUBLE JEOPARDY UNDER THE CALIFORNIA CONSTITUTION

### A. Relying on the California Constitution

Irrespective of whether the majority is correct regarding the nonapplicability of the federal double jeopardy clause to this case, I conclude retrial of the prior felony conviction allegation is prohibited by the state constitutional double jeopardy clause. (Cal. Const., art. I, § 15.) Our state counterpart to the federal double jeopardy clause first appeared in the California Constitution of 1849, article I, section 8, where the language tracked the federal guarantee. The provision was moved essentially unchanged to article I, section 13 in the California Constitution of 1879, and finally came to rest in article I, section 15, of the present California Constitution; it provides: "Persons may not twice be put in jeopardy for the same offense. . . ."

Article I, section 24 of the state charter, added by popular vote in 1974, is also relevant to our discussion; it provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." That section was amended by Proposition 115 to state the following qualification: "In criminal cases the rights of a defendant to . . . not be placed twice in jeopardy for the same offense . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This [state] Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States. . . ." This latter provision was invalidated, however, in *Raven v. Deukmejian*

(1990) 52 Cal.3d 336 (hereafter *Raven*), as an improper revision of the state Constitution.

In light of the holding in *Raven* we remain free to continue our long-standing and constitutionally authorized practice, in appropriate situations, of interpreting our state Constitution to grant greater protection to state residents than would be afforded by the high court under the federal Constitution. It is true, as the lead opinion notes, that we have previously explained there must be "cogent reasons . . . before a state court construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (*Raven, supra*, 52 Cal.3d at p. 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.) This admonishment finds no application here, however, for, as explained, *ante*, the Supreme Court has never ruled on the question whether the federal double jeopardy clause applies to noncapital sentence enhancements. There is thus no federal construction from which to depart.

Significantly, we most recently faced this federal versus state Constitution question in a case specifically posing a double jeopardy question; there, we reaffirmed that "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than the federal Constitution." (*People v. Fields* (1996) 13 Cal.4th 289, 298.)

Indeed, good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies here. It is hornbook law that at the

time the Bill of Rights was ratified in 1791, and until the 1920's, the Bill of Rights was not understood to apply against the states at all. (*Barron v. Baltimore* (1833) 32 U.S. (7 Pet.) 243.) Due to the selective nature of the incorporation doctrine, which arose in this century (see generally, *Nowak & Rotunda*, *Constitutional Law* (5th ed. 1995) § 10.2, pp. 339-342), application to the states of the various portions of the Bill of Rights was addressed judicially in a sequential manner. The federal constitutional guarantee not to be placed twice in jeopardy was not held applicable to state prosecutions until 1969. (*Benton v. Maryland, supra*, 395 U.S. 784.) Until that year, we had always relied solely on our own state Constitution to protect our residents from being placed twice in jeopardy.

Moreover, other than the rather obscure provisions in article II, section 10 of the federal Constitution (prohibitions of ex post facto laws, bills of attainder, interference with contracts), the Constitution placed no limitation on states in the area of personal liberties until ratification of the Fourteenth Amendment in 1868, almost two decades after California was granted statehood. From this bit of history, we can draw two conclusions. First, "[f]or most of the life of this nation the Federal Constitution offered no protection for the personal, religious, intellectual and political rights of its citizens in their relations with state and local government. In California those protections were provided by the Declaration of Rights - Article I of the California constitution - which contains provisions much like those of the Federal Bill of Rights." (Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground* (1973) 61 Cal.L.Rev. 273, 274, capitalization in original



[hereafter Falk article].) Second, and more important for our purposes, for the majority of this state's political life, it has been the state, not federal, Constitution that protected the personal liberties – specifically the right to not be placed twice in jeopardy – of Californians.

If we go back even further in history, we find that state constitutional protections of individual liberties are not even derived from the Bill of Rights; rather, the reverse is true. "The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions." (Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv.L.Rev. 489, 501 [hereafter Brennan article].) When drafting the Declaration of Rights in our state Constitution, first in 1849 and again in 1879, "the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models." (*Raven*, *supra*, 52 Cal.3d at p. 353.) There is thus good reason to look first to our state Constitution for guidance.

In interpreting the extent of various rights of personal liberty, this court has in the past eschewed the federal document and relied on the state Constitution in two distinct situations. First, we sometimes relied on our state Constitution to diverge from the high court's interpretation of an analogous federal constitutional provision when we concluded the high court did not provide sufficient protection for individual liberties. For example, we held in *People v. Brisendine* (1975) 13 Cal.3d 528, 545-552,

that a search incident to lawful arrest must be justified by a rule of reasonableness, contrary to the Supreme Court's decision in *United States v. Robinson* (1973) 414 U.S. 260, which held a search incident to lawful arrest was per se reasonable.<sup>4</sup> (See cases collected at *Raven*, *supra*, 52 Cal.3d at p. 354; see generally, Grodin, Massey & Cunningham, *The California State Constitution* (1993) pp. 21-26 & accompanying notes; Falk article, 61 Cal.L.Rev. at pp. 277-280 & accompanying notes.)

Although we invalidated in *Raven* that portion of Proposition 115 tying state constitutional interpretation to the federal Constitution, we nonetheless remain cognizant the electorate expressed displeasure with state constitutional interpretations that granted criminal defendants greater procedural rights than are required under the federal Constitution. Accordingly, although we remain free, in light of *Raven*, to continue to interpret the state Constitution more expansively than its federal counterpart, we have declared there must be "cogent reasons" to do so. (*Raven*, *supra*, 52 Cal.3d at p. 353.) Here, however, we are not presented with such a situation because, as explained *ante*, the United States Supreme Court has never ruled on the precise issue before us.

We are, rather, presented with the second type of situation in which we historically have interpreted the

---

<sup>4</sup> Of course, *Brisendine* and other state-law-based search-and-seizure cases were superseded by the enactment of Proposition 8. (See Cal. Const, art. I, § 28(d) [right to truth-in-evidence provision]; *In re Lance W.* (1985) 37 Cal.3d 873 [upholding same].)

state Constitution to provide protection of individual liberties, namely, *when no United States Supreme Court authority had yet emerged*. For example, in an opinion by Justice Mosk, we held the California Constitution guaranteed the right to counsel for persons charged with misdemeanors. (*In re Johnson* (1965) 62 Cal.2d 325, 329.) At the time, no federal constitutional rule had yet emerged. Seven years later, the Supreme Court found a federal constitutional right to counsel in misdemeanor cases, at least where imprisonment was a possibility. (*Argersinger v. Hamlin* (1972) 407 U.S. 25.)

In the absence of federal constitutional authority binding us, we clearly are free to look to our state Constitution. Indeed, reliance on the state Constitution is preferable here, for not only has the United States Supreme Court never specifically ruled on the applicability of the federal double jeopardy clause to noncapital sentencing proceedings or sentence enhancements, it has had several opportunities to address the issue and has declined each time. (*Caspari, supra*, 510 U.S. 383, *Lockhart v. Nelson, supra*, 488 U.S. 33; *Hunt v. New York, supra*, 502 U.S. 964 (opn. of White, J., dis. from den. of cert.); see also *Carpenter v. Chappleau, supra*, 72 F.3d 1269, cert. den. \_\_\_ U.S. \_\_\_, 136 L.Ed.2d 61 (1996); *Wilmer, supra*, 30 F.3d 451, cert. den. 513 U.S. 970 (1994); *Denton, supra*, 873 F.2d 144, cert. den. 493 U.S. 941 (1989); *Duroske v. Lewis, supra*, 882 F.2d 357, cert. den. 495 U.S. 907 (1990); *Linam v. Griffin, supra*, 685 U.S. 369, cert. den. 459 U.S. 1211 (1983); *People v. Levin, supra*, 623 N.E.2d 317, cert. den. sub nom. *Levin v. Illinois*, 513 U.S. 826 (1994); *People v. Sailor, supra*, 491 N.Y.S.2d 112, cert. den. sub nom. *Sailor v. New York*, 474 U.S. 982 (1985).) Not only, therefore, are we left with no definitive

holding from the high court, we cannot anticipate that court will soon resolve the question. This uncertain state of affairs provides "cogent reasons" (*Raven, supra*, 52 Cal.3d at p. 353), were they needed, for us to rely on our state Constitution. (See *Ex Parte Augusta, supra*, 639 S.W.2d at p. 485 [applying double jeopardy under Texas Constitution to noncapital sentencing proceeding]; *DeBussi v. State, supra*, 453 So.2d 1030, 1032-1033 [applying a *Bullington*-type analysis to conclude double jeopardy under the Mississippi Constitution barred retrial of habitual offender allegation].)

#### B. Double Jeopardy under the State Constitution

When double jeopardy principles are involved, history shows we have not felt compelled to walk in the footprints left by United States Supreme Court precedent. For example, in *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, we held double jeopardy would preclude retrial following a mistrial granted over the defendant's objection. Although a retrial would have been allowed under the federal Constitution (*Gori v. United States* (1961) 367 U.S. 364), we simply stated: "[the federal] holding [in *Gori*] does not accord with the uniform construction placed by the court upon the jeopardy provision of the California Constitution. . . ." (*Cardenas, supra*, at p. 276.) We explicitly reaffirmed *Cardenas* in *Curry v. Superior Court* (1970) 2 Cal.3d 707, 715-716.

*People v. Henderson* (1963) 60 Cal.2d 482 (hereafter *Henderson*), is similar. In *Henderson*, the defendant was convicted, on his plea of guilty, of first degree murder and sentenced to life imprisonment. On appeal, the court



reversed for trial court error in permitting the defendant to withdraw his original plea of not guilty. On remand, the defendant was again convicted; this time, he was sentenced to suffer the death penalty. On appeal in this court, the defendant argued imposition of the death penalty on retrial violated his right against double jeopardy as set forth in article I, then-section 13 of the state Constitution.

This court agreed. Noting that in *Stroud, supra*, 251 U.S. 15, the Supreme Court held the federal double jeopardy clause did not prohibit imposition of the death penalty after a retrial for a defendant originally sentenced to life imprisonment, this court found the state Constitution marked out a different path: "A defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Henderson, supra*, 60 Cal.2d at p. 497.)

The Supreme Court followed *Stroud* with *North Carolina v. Pearce, supra*, 395 U.S. 711, a 1969 noncapital case, holding a greater sentence after a retrial does not violate the federal due process clause. We again followed our own path, applying to noncapital cases the state constitutional double jeopardy rule set forth in *Henderson, supra*, 60 Cal.2d 482. (*People v. Hood* (1969) 1 Cal.3d 444, 459 [following *Henderson* but not mentioning *Pearce*].) As one Court of Appeal observed: "[a]lthough presented with . . . the opportunity to [overrule *Henderson*] . . . , the court

has never retreated from the rationale or holding of *Henderson*." (*People v. Superior Court (Harris)* (1990) 217 Cal.App.3d 1332, 1337, citing inter alia, *People v. Collins* (1978) 21 Cal.3d 208, 216-217; *People v. White* (1976) 16 Cal.3d 791, 802; *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *Curry v. Superior Court, supra*, 2 Cal.3d at pp. 716-717; *People v. Hood, supra*, 1 Cal.3d at p. 459.)

In *People v. Comingore* (1977) 20 Cal.3d 142, the defendant, who had stolen a car in California and driven it to Oregon, was convicted in Oregon of unauthorized use of a vehicle. Upon his release, he was prosecuted in California for grand theft auto based on essentially the same acts that gave rise to the Oregon conviction. Although the California prosecution would have been permissible under the high court's interpretation of the Fifth Amendment double jeopardy clause (see *Abbate v. United States* (1959) 359 U.S. 187), we held Penal Code section 793, a statute implementing double jeopardy principles, prohibited the California trial as it was predicated on the same facts that formed the basis of the Oregon trial. We did not expressly mention the state Constitution, but merely stated the rule in *Abbate* "does not preclude a state from providing greater double jeopardy protection than is provided by the federal Constitution. . . ." (*Comingore, supra*, 20 Cal.3d at p. 145.) Although *Comingore* is not unequivocally a state constitutional (as opposed to state statutory) case, the principles at work seem congruent, especially because Penal Code section 793 merely implements the state constitutional double jeopardy guarantee.

In light of this court's strong history of relying on the state Constitution as a document of independent force in the double jeopardy area, I would rely on that document to resolve this case.

**C. Applicability of State Double Jeopardy Principles to Sentence Enhancement Allegations**

As the lead opinion concedes, we recently determined double jeopardy principles precluded retrial of a firearm use enhancement allegation, charged pursuant to Penal Code section 12022.5, where the defendant's jury had previously found the allegation not true. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78, fn. 22 [hereafter *Marks*]; cf. *People v. Santamaria* (1994) 8 Cal.4th 903, 910 ["The parties agree(d) that the jury's 'not true' finding on the knife-use enhancement allegation precludes retrial of that allegation"].) Noting the jury had found the allegation the defendant personally used a firearm "not true," we held "[t]he jury's rejection constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks, supra*, 1 Cal.4th at p. 78, fn. 22.)

Because *Marks* is but a few years old and applied double jeopardy principles to a finding on a sentence enhancement, one might assume it provides relevant authority to decide this case. The lead opinion, however, posits two reasons why it believes *Marks* is irrelevant to the proper resolution of this case. First, the lead opinion opines that *Marks* relies on a line of cases that are based on a state constitutional rule of double jeopardy that precludes penalizing a defendant with a longer sentence

following a successful appeal of his or her conviction. (Lead opn., ante, pp. 18-19.)<sup>5</sup> Second, the lead opinion asserts that "because *Marks* included no analysis of the complex issues we address in this case, we think a narrow reading of *Marks* is appropriate." (Lead opn., ante, p. 19.)

The lead opinion's attempt to cabin the rationale in *Marks* founders because it fails to account for the *Marks* decision's emphasis on the fact the jury in that case found the enhancement allegation "not true," and *Marks*'s characterization of this finding as an "acquittal." The concept of an acquittal clearly implicates the historic constitutional double jeopardy bar to retrial. Indeed, if the federal double jeopardy clause protects against anything, it "protects against a second prosecution for the same offense after acquittal." (*North Carolina v. Pearce, supra*, 395 U.S. 711, 717, italics added, fn. omitted.) "[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy. . . ." (*Green v. United States, supra*, 355 U.S. at p. 188, italics added.) By emphasizing the jury found the enhancement allegation "not true" and characterizing the finding as an "acquittal," the *Marks* court was clearly invoking this "long-settled" constitutional doctrine.

Moreover, the *Henderson-Collins-Hood* line of cases (see fn. 5, ante) cited in *Marks*, does not prohibit any

<sup>5</sup> Such cases include *People v. Collins, supra*, 21 Cal.3d 208, 216-217, *People v. Hood, supra*, 1 Cal.3d 444, 459, *Henderson, supra*, 60 Cal.2d 482, 496-497, *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1331-1332, and *People v. Asbury* (1985) 173 Cal.App.3d 362, 366.



retrial at all, but merely limits the aggregate sentence to no more than was achieved in the first trial. Thus, in *Henderson, supra*, 60 Cal.2d 482, where the defendant was sentenced to life imprisonment following his first trial, we did not purport to prevent any retrial whatsoever; we merely held he could not be given the greater sentence of the death penalty following retrial. Invoking the same rule in *People v. Hood, supra*, 1 Cal.3d 444, we permitted a retrial but limited the aggregate sentence to that achieved in the first trial. (*Id.*, p. 459.) If, as suggested by the lead opinion, *Marks* was based solely on the state constitutional right against imposition of a greater sentence on retrial following a successful appeal, the *Marks* opinion should have permitted a retrial. Instead, *Marks* concluded "[t]he jury's rejection [of the enhancement] constituted an express acquittal on the enhancement and forecloses any retrial." (*Marks, supra*, 1 Cal.4th at p. 78, fn. 22, italics added.) The lead opinion's belated attempt to redefine the meaning of *Marks* is thus unpersuasive.

Moreover, the lead opinion's restrictive reading of the double jeopardy clause of the California Constitution fails to address the following authorities, which pose analogous sentence enhancements and conclude double jeopardy applies: *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1309 (double jeopardy precludes retrial of Pen. Code, § 667.7 habitual offender enhancement because it was reversed for insufficient evidence); *People v. Pettaway, supra*, 206 Cal.App.3d at p. 1332, reversed on other grounds *sub nom., Pettaway v. Plummer* (9th Cir. 1991) 943 F.2d 1041 (state constitutional double jeopardy provision prohibits retrial of Pen. Code, § 12022.5 [personal firearm use] and Pen. Code, § 12022.7 [personal infliction of great

bodily injury] enhancements following jury verdict enhancements were "not true" as to murder charge); *People v. Jones* (1988) 203 Cal.App.3d 456, 460, disapproved on another point, *People v. Tenner, supra*, 6 Cal.4th at p. 566, fn. 2 (double jeopardy precludes retrial of Pen. Code, § 667.5 prior felony conviction enhancement); *People v. Raby* (1986) 179 Cal.App.3d 577, 591 (double jeopardy precludes retrial of prior felony enhancement); and *People v. Bonner* (1979) 97 Cal.App.3d 573, 575 (double jeopardy prohibits reprosecution of narcotics weight enhancement allegation following appellate reversal for insufficient evidence); see also *People v. Guillen* (1994) 25 Cal.App.4th 756 (reaffirming *Bonner*, but finding mistrial on weight enhancement does not preclude retrial); *People v. Reynolds* (1989) 211 Cal.App.3d 382, 390 (double jeopardy does not prevent retrial of serious felony enhancement under Pen. Code, § 667 because it was reversed for trial error and not for insufficient evidence).

It bears repeating that "the double jeopardy clause is no mere 'technicality'; it is an integral part of 'the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial.'" (*United States v. Jorn* [(1971)], *supra*, 400 U.S. [470] at p. 479 (plur. opn.).) Effectuating the spirit as well as the letter of its liberality, courts have 'disparaged "rigid, mechanical" rules in [its] interpretation. . . . [Citation.]' (*Serfass v. United States* [(1975)], *supra*, 420 U.S. [377] at p. 390.) In animating our own independent 'vital safeguard,' we have expressly refused to perpetuate 'spurious distinction[s]' at the risk of 'giving our constitutional prohibition against twice in jeopardy a "narrow, grudging application" unsupported by either logic or reason.'

(*Gomez v. Superior Court* [(1958)], *supra*, 50 Cal.2d [640] at p. 649. . . .)" (*Marks, supra*, 1 Cal.4th at p. 79.)

Perhaps a bit uncomfortable with its decision – understandably, since the specter of a defendant being retried innumerable times on the same allegations until the People finally succeed in proving them true is indeed disturbing – the lead opinion concludes by detailing a long list of what it is not deciding. It explains that although the People are not prohibited by double jeopardy principles from retrying the prior felony conviction enhancement, other limits might curtail the ability of the People on retrial to obtain a true finding. The lead opinion opines, for example, that on retrial the People cannot rely solely on the same evidence as initially presented, for even if the bedrock principle of double jeopardy does not apply to bar retrial, the more amorphous prudential principles of law of the case will apply. The lead opinion, although it declines to elaborate, also suggests unspecified limitations might restrict such required additional evidence. Similarly, the lead opinion hints there may be due process limits in such a retrial. (Lead opn., *ante*, p. 21.) One can only guess what these intimations mean for future cases; what is clear is that for this defendant, on the facts of this particular case, retrial following acquittal is permitted.

Such legal contortions are unnecessary. Not only does this court have a long history of relying on the state constitutional double jeopardy clause rather than its federal counterpart, there is in this state an unbroken line of cases applying the double jeopardy principles to noncapital sentence enhancement allegations. The majority breaks from this history without persuasive reasons for

doing so. Accordingly, I would find the Court of Appeal's decision that the People adduced insufficient evidence to prove the enhancement alleged pursuant to Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d), prohibits retrial of the same enhancement allegation pursuant to article I, section 15 of the California Constitution. The People having had one good chance to prove the truth of the prior conviction allegation, they should now be barred by the state constitutional double jeopardy clause from a second chance to prove the same charge.

#### CONCLUSION

The lead opinion twice mentions the ease with which the People can prove a prior felony conviction such that it may be used to increase an offender's sentence: "a prior conviction trial," we are told, "is simple and straightforward," and "the outcome is relatively predictable." (Lead opn., *ante*, p. 13.) And again, repeating itself, the lead opinion declaims: "trial of a prior conviction allegation is relatively perfunctory, and the outcome is usually predictable." (*Id.*, at p. 21.) I agree. Under such circumstances, I see no reason to do violence to double jeopardy principles merely to permit the People multiple opportunities to prove the existence of such prior convictions. I dissent.

WERDEGAR, J.

WE CONCUR:

MOSK, J.

KENNARD, J.

---



SUPREME COURT OF THE UNITED STATES

No. 97-6146

Angel Jaime Monge,

Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the  
Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply.

January 16, 1998

---

7

No. 97-6146

Supreme Court, U.S.  
**FILED**  
**FEB 26 1998**  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1997

ANGEL J. MONGE,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of The  
State Of California

PETITIONER'S BRIEF ON THE MERITS

CLIFF GARDNER\*  
KATHRYN E. COLLIER  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109  
(415) 922-9404

*Counsel for Petitioner*

*\* Counsel of Record*

75/P2



**QUESTION PRESENTED**

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have all the hallmarks of a trial on guilt or innocence?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT.....	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
The Charges.....	2
Trial On The Underlying Offense And The Enhanc- ing Allegations.....	3
Sentencing.....	5
The State Court's Finding Of Insufficiency.....	5
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	11
I. WHEN A DEFENDANT HAS FORMALLY BEEN TRIED FOR AND ACQUITTED OF A SENTENCE ENHANCEMENT THAT EXPOSED HIM TO AN ADDITIONAL FIVE YEARS IN STATE PRISON, AND THE SENTENCE ENHANCEMENT TRIAL HAD ALL THE HALLMARKS OF A GUILT/ INNOCENCE TRIAL, THE DOUBLE JEOPARDY CLAUSE PRECLUDES THE STATE FROM A SEC- OND CHANCE TO PROVE ITS CASE.....	11
A. Because The Decision Of The Sentencer At A Traditional Sentencing Proceeding Is So Dif- ferent From That Of The Factfinder At A Trial On Guilt Or Innocence, The Court Has Con- sistently Exempted Traditional Sentencing Proceedings From The Strict Constitutional Requirements Applied To Trials.....	12

## TABLE OF CONTENTS – Continued

	Page
B. Where The Decision Made By The Factfinder At A Sentence Enhancement Trial Is Identical To That Made At A Trial On Guilt Or Innocence, And The Proceeding Has All The Hallmarks Of Trial, Double Jeopardy Must Apply.....	17
1. In holding that many constitutional pro- tections available to a defendant at a crim- inal trial are equally available at a sentence enhancement trial, the Court routinely examines the substance and nature of the sentence enhancement pro- ceeding.....	18
2. The Court's Double Jeopardy cases take the same approach, holding Double Jeop- ardy applicable to sentence enhancement trials whose substance and nature are identical to a guilt/innocence trial.....	22
C. In Deciding Whether Double Jeopardy Applies To A Sentence Enhancement Trial, The Vast Majority Of Jurisdictions Apply <i>Bullington's "Hallmarks Of Trial" Test</i> .....	29
1. The majority rule.....	30
2. The minority rule.....	35
D. Because California's Sentence Enhancement Scheme Contains All The Hallmarks Of A Guilt/Innocence Trial, Requires The Fact- finder To Convict Or Acquit Of The Charge And Exposes The Defendant To Significant Enhanced Punishment, Double Jeopardy Applies To These Proceedings.....	36
CONCLUSION.....	47



## TABLE OF AUTHORITIES

## Page

## CASES

<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984) .....	<i>passim</i>
<i>Baldwin v. New York</i> , 399 U.S. 66 (1970) .....	30
<i>Bell v. State</i> , 622 N.E.2d 450 (Ind. 1993) .....	35
<i>Blanton v. City of North Las Vegas</i> , 489 U.S. 538 (1989) .....	27
<i>Bohlen v. Caspari</i> , 979 F.2d 109 (8th Cir. 1992) .....	32
<i>Bowman v. State</i> , 314 Md. 725, 552 A.2d 1303 (Md. 1989) .....	31
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993) .....	29
<i>Breed v. Jones</i> , 421 U.S. 519 (1975) .....	27
<i>Briggs v. Procunier</i> , 692 F.2d 368 (5th Cir. 1982) .....	32
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981) .....	<i>passim</i>
<i>Burks v. United States</i> , 437 U.S. 1 (1978) .....	7, 12, 14, 29, 41, 47
<i>Butler v. McKellar</i> , 494 U.S. 407 (1990) .....	43
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994) .....	29, 32, 42, 43, 44
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973) .....	14, 24
<i>Chandler v. Fretag</i> , 348 U.S. 3 (1954) .....	18, 20, 21, 22, 23, 43
<i>Chewning v. Cunningham</i> , 368 U.S. 443 (1962) .....	18
<i>Clark v. State</i> , 851 P.2d 426 (Nev. 1993) .....	35
<i>Cooper v. State</i> , 631 S.W.2d 508 (Tex. 1982) .....	30
<i>Cooper v. State</i> , 810 P.2d 1303 (Okla. 1991) .....	34
<i>Davis v. Commonwealth</i> , 899 S.W.2d 487 (Ky. 1995) .....	31

## TABLE OF AUTHORITIES - Continued

## Page

<i>Debussi v. State</i> , 453 So.2d 1030 (Miss. 1984) .....	31
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986) .....	12
<i>Denton v. Duckworth</i> , 873 F.2d 144 (7th Cir. 1989) .....	35
<i>Durham v. State</i> , 464 N.E.2d 321 (Ind. 1984) .....	35
<i>Durosko v. Lewis</i> , 882 F.2d 357 (9th Cir. 1989) .....	32
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982) .....	29
<i>Ex parte Lange</i> , 18 Wall. 163 (1874) .....	25
<i>Fitzpatrick v. State</i> , 194 Mont. 310, 638 P.2d 1002 (1981) .....	32, 34
<i>Fong Foo v. United States</i> , 369 U.S. 141 (1962) .....	14
<i>French v. Estelle</i> , 692 F.2d 1021 (5th Cir. 1982) .....	32
<i>Graham v. West Virginia</i> , 224 U.S. 616 (1912) .....	30
<i>In re Bradley</i> , 318 U.S. 50 (1943) .....	25
<i>In re Oliver</i> , 333 U.S. 257 (1947) .....	12
<i>In re Ruffalo</i> , 390 U.S. 544 (1968) .....	12
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	12
<i>In re Yurko</i> , 10 Cal.3d 857 (1974) .....	37
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436 (1986) .....	29
<i>Linam v. Green</i> , 685 F.2d 369 (10th Cir. 1982) .....	36
<i>Lockhart v. Nelson</i> , 488 U.S. 33 (1988) .....	29
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528 (1971) .....	27, 30
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986) .....	14, 43
<i>Moore v. Missouri</i> , 159 U.S. 673 (1895) .....	30

## TABLE OF AUTHORITIES - Continued

## Page

<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)...	21, 22, 23, 45
<i>Nelson v. Lockhart</i> , 828 F.2d 446 (8th Cir. 1987).....	32
<i>Nichols v. United States</i> , 511 U.S. ___, 114 S.Ct. 1821 (1994).....	14
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969) .....	<i>passim</i>
<i>Olsen v. State</i> , 691 So.2d 17 (Fla. 1997) .....	32, 34
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962).....	18, 20, 44
<i>Patterson v. New York</i> , 432 U.S. 197 (1977) .....	45
<i>Pennsylvania v. Goldhammer</i> , 474 U.S. 28 (1985).....	16
<i>People v. Aragon</i> , 116 N.M. 267, 861 P.2d 948 (N.M. 1993).....	35
<i>People v. Burnes</i> , 224 Cal.App.3d 1222 (1990).....	39
<i>People v. Calderon</i> , 9 Cal.4th 69 (1994) .....	37
<i>People v. Equarte</i> , 42 Cal.3d 456 (1986).....	4
<i>People v. Gonzales</i> , 208 Cal.App.3d 1170 (1989).....	40
<i>People v. Gulbrandsen</i> , 209 Cal.App.3d 1547 (1989) ....	39
<i>People v. Hernandez</i> , 46 Cal.3d 194 (1988) .....	40
<i>People v. Levin</i> , 157 Ill.2d 138, 623 N.E.2d 317 (Ill. 1993).....	32, 33
<i>People v. Lockwood</i> , 253 Cal.App.2d 75 (1967) .....	40
<i>People v. Meyers</i> , 5 Cal.4th 1193 (1993).....	37
<i>People v. Monge</i> , 16 Cal.4th 826 (1997).....	<i>passim</i>
<i>People v. Morton</i> , 41 Cal.2d 536 (1953).....	38
<i>People v. Quintana</i> , 634 P.2d 413 (Colo. 1981) .....	30

## TABLE OF AUTHORITIES - Continued

## Page

<i>People v. Reed</i> , 13 Cal.4th 217 (1996).....	37
<i>People v. Rodriguez</i> , 17 Cal.4th 253 (1997) .....	4
<i>People v. Sailor</i> , 65 N.Y.2d 224 (N.Y. 1985) .....	32, 33
<i>People v. Smith</i> , 33 Cal.3d 596 (1983) .....	38, 40
<i>People v. Tenner</i> , 6 Cal.4th 559 (1993) .....	37, 38
<i>People v. Welch</i> , 5 Cal.4th 228 (1993).....	39
<i>People v. Zinn</i> , 217 Mich.App. 340, 551 N.W.2d 704 (1996) .....	35
<i>Poore v. State</i> , 685 N.E.2d 36 (Ind. 1997).....	31, 35
<i>Reed v. State</i> , 581 S.W.2d 145 (Tenn. 1978) .....	31
<i>Robinson v. Neil</i> , 409 U.S. 505 (1973).....	27
<i>Specht v. Patterson</i> , 386 U.S. 605 (1967) .....	<i>passim</i>
<i>State v. Aspen</i> , 412 N.W.2d 881 (S.D. 1987).....	31
<i>State v. Barlowe</i> , 242 Iowa 714, 46 N.W.2d 725 (1951).....	34
<i>State v. Cobb</i> , 875 S.W.2d 533 (Mo. 1994) .....	35
<i>State v. Gorman</i> , 546 N.W.2d 5 (Minn. 1996) .....	35
<i>State v. Hennings</i> , 100 Wash.2d 379, 670 P.2d 256 (Wash. 1983) .....	30, 31
<i>State v. Hulse</i> , 785 S.W.2d 373 (Tenn. 1989) .....	30
<i>State v. Jones</i> , 314 N.C. 644, 336 S.E.2d 385 (N.C. 1985).....	32, 34
<i>State v. Ledbetter</i> , 240 Conn. 317, 692 A.2d 713 (1997) .....	31



## TABLE OF AUTHORITIES - Continued

	Page
<i>State v. Sanders</i> , 35 Or.App. 503, 582 P.2d 426 (1978) .....	35
<i>State v. Sowards</i> , 147 Ariz. 156, 709 P.2d 513 (1985) ..	32, 34
<i>State v. Theriault</i> , 187 Wis.2d 125, 522 N.W.2d 254 (1994) .....	34
<i>Stroud v. United States</i> , 251 U.S. 15 (1919) ....	24, 25, 42
<i>Teague v. Lane</i> , 489 U.S. 288 (1989) .....	32, 43, 44
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980) .....	<i>passim</i>
<i>United States v. Dixon</i> , 509 U.S. 688 (1993) .....	27
<i>United States v. Hudson</i> , ___ U.S. ___, 118 S.Ct. 488 (1998) .....	26
<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 564 (1977) .....	23
<i>United States v. Ursery</i> , ___ U.S. ___, 116 S.Ct. 2135 (1996) .....	26
<i>United States v. Watts</i> , ___ U.S. ___, 117 S.Ct. 633 (1997) .....	13
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990) .....	27
<i>Washington v. Texas</i> , 388 U.S. 14 (1967) .....	12
<i>Williams v. New York</i> , 337 U.S. 241 (1949) .....	13, 19, 20
<i>Wilmer v. Johnson</i> , 30 F.3d 451 (3d Cir. 1994) .....	33
<i>Witte v. United States</i> , 515 U.S. 389 (1995) .....	26

## TABLE OF AUTHORITIES - Continued

	Page
UNITED STATES CONSTITUTION	
Fifth Amendment .....	1
Eighth Amendment .....	26
Fourteenth Amendment .....	1
UNITED STATES CODE	
28 U.S.C. § 1275(a) .....	1
STATUTES	
CALIFORNIA PENAL CODE	
§ 245 .....	4
§ 667 .....	1, 2, 3
§ 667(b)-(i) .....	3
§ 667(c) .....	37
§ 667(e)(1) .....	36
§ 667(e)(2)(A)(i) .....	36
§ 667(g) .....	37
§ 969.5 .....	37
§ 1025 .....	37
§ 1158 .....	37
§ 1170(a)(3) .....	36, 39
§ 1170(b) .....	39
§ 1170.12 .....	1, 2, 3
§ 1170.12(a)-(d) .....	3

## TABLE OF AUTHORITIES - Continued

Page

§ 1192.7 .....	1, 2, 6
§ 1192.7(c)(8) .....	4
§ 1192.7(c)(23) .....	4
§ 1203(b)(1).....	40
§ 1238.....	38
§ 1238(a)(6).....	40
§ 1238(d).....	40
§ 1238(10) .....	40

## CALIFORNIA RULES OF COURT

California Rule of Court 408(a) .....	40
California Rule of Court 411(a) .....	40
California Rule of Court 411.5 .....	40
California Rule of Court 420.....	39
California Rule of Court 421.....	39
California Rule of Court 423.....	39
California Rule of Court 425.....	39
California Rule of Court 425(b) .....	39
California Rule of Court 439.....	40

## CALIFORNIA HEALTH &amp; SAFETY CODE

§ 11359.....	2
§ 11360(a) .....	2
§ 11361(a) .....	36

## TABLE OF AUTHORITIES - Continued

Page

## OTHER AUTHORITIES

## PENNSYLVANIA STATUTE

42 Pa. Cons. Stat. Ann. § 9714.....	35
-------------------------------------	----

## ALASKA STATUTES

Alaska Statute § 12.55.025(i) .....	35
Alaska Statute § 12.55.145 .....	35

## FLORIDA STATUTE

Flor. Stat. § 775.084(3)(a)(4) .....	34
--------------------------------------	----

## MICHIGAN STATUTE

Mich. Comp. Laws Ann. § 769.13 .....	35
--------------------------------------	----

## MINNESOTA STATUTE

Minn. Stat. Ann. § 609.15.....	35
--------------------------------	----

## NORTH DAKOTA

Crim. Code § 12.1-32-09 .....	35
-------------------------------	----

## OREGON

Rev. Stat. § 161.725 .....	35
----------------------------	----

## RHODE ISLAND

Gen. Laws § 12-19-21.....	35
---------------------------	----



## OPINIONS BELOW

The opinion of the California Supreme Court is reported as *People v. Monge*, 16 Cal.4th 826, 66 Cal.Rptr. 853, 941 P.2d 1121 (1997), and is located in the Joint Appendix ("JA") at pages 49-131. The unpublished opinion of the California Court of Appeal is included at JA 40-48.

---

## JURISDICTIONAL STATEMENT

The California Supreme Court issued its opinion on August 27, 1997. Petitioner filed a petition for writ of certiorari with this Court on September 29, 1997. The Court granted the writ on January 16, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1275(a).

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy guarantee of the Fifth Amendment to the United States Constitution, the Due Process guarantee of the Fourteenth Amendment and California Penal Code §§ 667, 1170.12 and 1192.7.

In relevant part, the Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy . . . ."

The Fourteenth Amendment provides:

Nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code §§ 667, 1170.12 and 1192.7 contain the California "three-strikes" law and are set forth in the Appendix attached to this brief.

---

### STATEMENT OF THE CASE

#### The Charges.

On March 16, 1995, the Los Angeles County District Attorney filed a three count information against petitioner Angel Monge. (CT 14-17.)<sup>1</sup> Count one charged that on January 25, 1995, Mr. Monge employed a minor to transport marijuana in violation of California Health and Safety Code § 11361(a). (CT 14.) Counts two and three charged lesser offenses arising out of the same transaction: sale of marijuana and possession of marijuana for sale in violation of California Health and Safety Code §§ 11360(a) and 11359 respectively. (CT 15.)

The information also gave notice that the state would seek to prove several additional allegations which would dramatically increase Mr. Monge's sentence. First, the information alleged that he had been convicted of a serious felony, a "strike" within the meaning of the state's then recently enacted three-strikes law. (CT 16.) Second, it

---

<sup>1</sup> Citations to "CT" denote the Clerk's Transcript on Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT." Citations to the Joint Appendix are denoted "JA."

alleged that in connection with this same prior conviction, he had served a prison term. (CT 16.)

Mr. Monge pled not guilty to all charges and moved to bifurcate trial on the three-strikes and prior prison term allegations. (CT 20; RT 3.) Under state law, this meant that these portions of the trial would not occur unless and until the jury convicted him of the underlying offense. The trial court granted this motion. (RT 3.)

#### Trial On The Underlying Offense And The Enhancing Allegations.

At trial, the state introduced sufficient evidence to show that on January 25, 1995, Mr. Monge assisted a minor in selling \$20.00 worth of marijuana to a team of six undercover officers. (RT 61-62, 66-90.) The jury convicted petitioner of the charged offenses. (RT 182-186; CT 82.) The formal trial on the prior conviction and prison term allegations then began. (CT 87.)

As noted, the state had charged Mr. Monge with having been convicted of a prior serious felony in violation of the three-strikes law. In particular, the state alleged that he had been convicted of a July 12, 1992, assault, a prior conviction within the meaning of California Penal Code §§ 667(b)-(i) and 1170.12(a)-(d). (CT 16.)<sup>2</sup>

Under California law, a prior assault will not expose a defendant to the three-strikes law unless the state

---

<sup>2</sup> Section 667 contains the three-strikes law enacted by the legislature in March of 1994. Section 1170.12 contains a substantively identical statute enacted by the voters in November of 1994.



proves it was committed in such a way as to constitute a "serious felony" as defined in Penal Code section 1192.7. It is not enough to introduce documentary evidence showing that a defendant was convicted of assault. Instead, the state must affirmatively prove how the assault was committed, establishing that the defendant either (1) personally used a dangerous or deadly weapon during the assault or (2) personally inflicted great bodily injury. See Cal. Penal Code § 1192.7(c)(8) and (c)(23); *People v. Rodriguez*, 17 Cal.4th 253, 261 (1997); *People v. Equarte*, 42 Cal.3d 456, 465 (1986).

Here, Mr. Monge pled not guilty to the prior conviction charge. Although he waived his statutory right to a jury, he affirmatively exercised his right to a bench trial on the allegation. (CT 20; RT 3, 187-188; JA 9-11, 15.) In an informal colloquy between the court and counsel, the prosecutor said that a stick was used in the prior assault. (RT 189; JA 12.) At the actual trial, however, the state introduced a single, four-page exhibit to carry its burden of proving that the prior conviction was a serious felony. (See Exhibit 1; CT 83-86; RT 192; JA 3-6, 16.)

This exhibit established two facts. First, it proved that on July 2, 1992 Mr. Monge was convicted of assault in violation of section 245(a)(1). (CT 85-86; JA 5-6.) Second, it proved that he served a prison term for this offense. (CT 84; JA 4.)

The state did not introduce any evidence to prove that a stick was used in the prior assault or that, if so, it was Mr. Monge who used it. (CT 83-86; RT 187-194; JA 3-6, 9-17.) The state did not introduce any evidence to show that Mr. Monge personally used any other object

during the assault which might be considered a dangerous or deadly weapon. (CT 83-86; RT 187-194; JA 3-6, 9-17.) The state did not introduce any evidence to prove that anyone, much less Mr. Monge, personally inflicted great bodily injury during the prior assault. (CT 83-86; RT 187-194; JA 3-6, 9-17.) Despite the dearth of such evidence, the trial court ruled that the state had presented sufficient evidence to prove that the prior assault was a serious felony as defined in section 1192.7. (CT 87; RT 193; JA 7, 16-17.)<sup>3</sup>

### **Sentencing.**

At sentencing, the trial court imposed a five year term for the count one charge and stayed sentence on the lesser charges. (CT 239; JA 19.) Based entirely on its verdict in connection with the 1992 assault prior, the court then added five years to this term. (RT 239; JA 19.)

To this 10-year term, the court added one year for the prison term served in connection with the 1992 assault. (RT 240; JA 19.) The total term of imprisonment was 11 years. (RT 242; JA 22.) Petitioner timely appealed his conviction to the California Court of Appeal. (CT 89-90.)

### **The State Court's Finding Of Insufficiency.**

While the appeal was pending, the state Court of Appeal recognized that the state had presented no evidence to prove that petitioner either (1) personally used a

<sup>3</sup> The trial court also found sufficient evidence to prove that Mr. Monge served a prison term in connection with the assault. (RT 193; JA 16.) That finding is not at issue here.

dangerous or deadly weapon during the assault or (2) personally inflicted great bodily injury. (JA 27-29.) The court requested briefing from both parties as to whether there was sufficient evidence to sustain the serious felony charge. (JA 27-29.)

In response, the state candidly conceded that it had presented insufficient evidence to prove either element necessary to prove the prior was a serious felony within section 1192.7:

As to the 1992 assault conviction . . . it would appear there is nothing in the record which proves appellant personally inflicted great bodily injury within the meaning of subdivision (c)(8) of section 1192.7 and/or used a dangerous or deadly weapon within the meaning of subdivision (c)(23) of section 1192.7.

(*People v. Monge*, B094905, Respondent's Supplemental Brief of June 17, 1996 at 2-3; JA 33.) In its subsequent opinion, the Court of Appeal agreed that the state had presented insufficient evidence to sustain the charged allegation and ordered it stricken. (JA 41-44.)

The state asked the Court of Appeal for a second chance to "properly prove beyond a reasonable doubt . . . that appellant personally inflicted great bodily injury . . . and/or used a dangerous or deadly weapon . . . ." (*People v. Monge*, B094905, Respondent's Supplemental Brief of June 17, 1996 at 4-5; JA 35.) The appellate court refused, ruling that Double Jeopardy did not permit the state repeated attempts to muster sufficient evidence to meet its burden of proof. (*People v. Monge*, B094905, Unpublished Opinion at 5-7; JA 46.)

The state sought review. The California Supreme Court granted review and, in a 4-3 decision, reversed. It held that the Double Jeopardy Clause **did** permit the state repeated chances at proving its case. *People v. Monge*, 16 Cal.4th 826. This Court granted certiorari on January 16, 1998.

---

### SUMMARY OF ARGUMENT

The state charged Mr. Monge with having committed a prior offense which brought him within the state's three-strikes law. If proven, the allegation would double Mr. Monge's prison sentence. At trial, the state had a full and unfettered opportunity to present evidence and carry its burden of proof. It failed and Mr. Monge was later acquitted. Now, alerted to the need for an improved presentation, the state wants a second chance to prove its case. The question presented is whether the Double Jeopardy Clause permits the state this second opportunity.

This question arises at the cross-roads of two lines of authority. The general rule, of course, is that the Double Jeopardy Clause prevents the state from retrying a defendant after an acquittal whether that acquittal occurs at trial or on appeal. *Burks v. United States*, 437 U.S. 1 (1978). In one series of cases, the Court has held that this general rule applies with full force to sentence enhancement trials which contain all the procedural hallmarks of trial. See, e.g., *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1981). In another series of cases, the Court has held that the protections of Double Jeopardy do not apply to traditional discretionary sentencing



proceedings to bar either a Government appeal or a longer sentence after a defendant obtains a reversal of his underlying conviction on appeal. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117 (1980); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Here, the state does not seek the right to appeal as in *DiFrancesco*. Nor does the state seek to impose a longer sentence after a defendant successfully appealed an underlying conviction as in *Pearce*. Instead, the state seeks a much greater power; it seeks to ignore an acquittal from one factfinder – be it a jury or an appellate court – so it can empanel another and try again.

A bare majority of the California Supreme Court authorized this practice. Noting that both *Rumsey* and *Bullington* involved sentence enhancement trials in capital cases, the state court cabined the rationale of those cases to the capital context. The court went on to allow the state a second bite at the apple. Although this case involved neither a state appeal, nor a longer sentence after defendant's underlying conviction had been reversed on appeal, the state court relied on the Double Jeopardy rule articulated in *DiFrancesco* and *Pearce* and applied to traditional sentencing hearings.

This reliance was fundamentally misplaced. The nature of a California three-strikes trial, and the role played by the factfinder in that trial, are completely different from the nature of a traditional sentencing hearing and the role played by the sentencer at that hearing. The scope of Double Jeopardy protection applicable to these two very different hearings must reflect this difference.

This Court has long recognized a distinction between the factfinder's role in determining guilt at a formal trial and the sentencer's role in exercising discretion to select an appropriate sentence at a traditional sentencing hearing. The factfinder's role is objective: it makes an historical determination as to whether the state has proven certain facts. In contrast, the sentencer's role is normative: it exercises discretion and selects an appropriate sentence. Because these roles are so different, this Court has exempted traditional sentencing hearings from many of the constitutional protections required in a criminal trial – such as confrontation, notice of the charges and Double Jeopardy.

For nearly half a century, however, this Court has maintained a parallel distinction between the factfinder's role in determining the truth of a sentence enhancement and the sentencer's role at sentencing. Like the factfinder at a trial on guilt or innocence, the factfinder in a sentence enhancement trial is making a discrete and objective finding of historical fact. Because this role is identical to the role of the factfinder at the trial on guilt or innocence, the Court has repeatedly held that many of the protections which apply to guilt/innocence determinations – such as confrontation and notice of the charges – also apply to formal trials on sentence enhancement allegations.

The Court's decisions in *Bullington* and *Rumsey* were straightforward applications of this principle in the Double Jeopardy context. The proceedings at issue in *Bullington* and *Rumsey* had all the hallmarks of trial, and the role played by the factfinder was identical to the role played by the factfinder in a trial on guilt or innocence.

Thus, Double Jeopardy was properly applied to those proceedings.

The role of the factfinder in a California three-strikes trial, and the nature of the trial itself, are also identical to a trial on guilt or innocence. A guilty verdict on a strikes allegation exposes a defendant to significant additional punishment above and beyond that prescribed for the current crime. The factfinder is making the same type of objective determination of historical fact typically made at a guilt/innocence trial. By state law, the protections of a criminal trial – including notice, a jury trial, proof beyond a reasonable doubt, the right to confrontation and the rules of evidence – all apply to that proceeding.

Under these circumstances, the Double Jeopardy Clause must apply as well. This result is consistent with the Court's longstanding distinction between sentence enhancement trials and traditional sentencing, it is consistent with *Bullington* and its progeny, and it is consistent with the vast weight of authority from lower courts applying *Bullington* in this same context.

The state was required to prove the allegation at issue in this case beyond a reasonable doubt. It failed. It should not be entitled to a second, third or fourth chance.

---

## ARGUMENT

### I. WHEN A DEFENDANT HAS FORMALLY BEEN TRIED FOR AND ACQUITTED OF A SENTENCE ENHANCEMENT THAT EXPOSED HIM TO AN ADDITIONAL FIVE YEARS IN STATE PRISON, AND THE SENTENCE ENHANCEMENT TRIAL HAD ALL THE HALLMARKS OF A GUILT/INNOCENCE TRIAL, THE DOUBLE JEOPARDY CLAUSE PRECLUDES THE STATE FROM A SECOND CHANCE TO PROVE ITS CASE.

The Double Jeopardy Clause consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. at 717. This case involves the first of these protections – the protection against reprosecution after acquittal.

Here, the state charged an allegation, had a full opportunity to prove its case beyond a reasonable doubt and failed. Whether the acquittal was by the jury or the reviewing court makes no difference. Once defendant was acquitted of the allegation, Double Jeopardy precluded the state from ignoring the verdict, empaneling a second, third or fourth jury, and seeking to prove the identical allegation beyond a reasonable doubt.



**A. Because The Decision Of The Sentencer At A Traditional Sentencing Proceeding Is So Different From That Of The Factfinder At A Trial On Guilt Or Innocence, The Court Has Consistently Exempted Traditional Sentencing Proceedings From The Strict Constitutional Requirements Applied To Trials.**

This Court has long recognized the fundamental distinction between the objective task of the factfinder in determining guilt and the subjective task of the sentencer in selecting an appropriate sentence. Both the nature of the determination made by the decisionmaker and the procedures which attend the decisionmaking process are entirely different.

In a trial on guilt or innocence, the factfinder is asked to make a straightforward "binary" determination as to whether the state has "prove[d] its case" against the defendant. See *Burks v. United States*, 437 U.S. at 15. In order to ensure the accuracy of this determination, a number of procedural safeguards apply. The state must provide notice of the charges. See *In re Ruffalo*, 390 U.S. 544, 550 (1968); *In re Oliver*, 333 U.S. 257, 273 (1947). The state's evidence is subject to confrontation. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The defendant must be allowed to present relevant evidence in his defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Finally, the state must prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970).

In contrast, the decisions made at a typical sentencing hearing are quite different. Unlike a trial on guilt or innocence, the sentencer does not decide whether the state has proved its case beyond a reasonable doubt.

Instead, the sentencer exercises a broad discretion in selecting an appropriate punishment from the range of punishments authorized by statute. The exercise of this discretion is "characteristically determined in large part on the basis of information . . . developed outside the courtroom. It is purely a judicial determination, and much more that goes into it is the result of inquiry that is nonadversary in nature." *United States v. DiFrancesco*, 449 U.S. at 136-137.

Thus, a sentencing determination is far different from the determination made at a formal guilt/innocence trial. Based on this difference, the Court has exempted traditional sentencing decisions from the strict constitutional requirements which govern guilt/innocence trials. The leading case to explain these differing procedures is *Williams v. New York*, 337 U.S. 241 (1949).

There, the Court explained that because of the normative nature of the typical sentencing decision, traditional sentencing hearings do not require many of the procedural protections applicable to a trial on guilt or innocence – such as notice, the right to confrontation and formal rules of evidence. *Williams v. New York*, 337 U.S. at 245-247. See *United States v. Watts*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 633, 635 (1997). To the contrary, a sentencing court "exercis[es] a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed . . . ." *Williams v. New York*, 337 U.S. at 246. Traditional sentencing thus relies on "out-of-court sources" and involves an inquiry "broad in scope, largely unlimited either as to the kind of information [considered] . . . or the source from which it may come." *Williams v. New York*, 337 U.S. at 250-251;

*Nichols v. United States*, 511 U.S. 738, 747 (1994). Moreover, at a true sentencing hearing the state need satisfy only the preponderance of the evidence standard. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986).

The Court has recognized this same distinction between formal trials and traditional sentencing in determining the scope of the Double Jeopardy Clause. Thus, when the state has failed to prove a criminal allegation at a formal trial where the rules of evidence apply, the state's burden of proof is beyond a reasonable doubt, and the factfinder's role is to determine whether the allegation is proved, Double Jeopardy bars the state from a second chance to prove that allegation beyond a reasonable doubt. See, e.g., *Burks v. United States*, 437 U.S. at 16-17; *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). This is so whether the defendant is acquitted at trial or by a reviewing court's finding of insufficient evidence. *Burks v. United States*, 437 U.S. at 16. Nor may the state appeal from an acquittal. See *Fong Foo v. United States*, 369 U.S. at 143.

Because of the differences between trial and sentencing, however, the Court has once again carved out an exception for the subjective determinations made at a sentencing hearing. When a defendant is sentenced at a hearing where the state's burden of proof is preponderance of the evidence, the formal rules of evidence do not apply, and the sentencer must exercise a broad discretion in selecting an appropriate sentence, Double Jeopardy will not bar a new sentencing hearing – and a more severe sentence – after a successful appeal. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*,

395 U.S. 711. Because of the relatively informal procedures attendant to such hearings, and the normative nature of the decision itself, "the pronouncement of sentence has never carried the finality that attaches to an acquittal." *United States v. DiFrancesco*, 449 U.S. at 133. Thus, Double Jeopardy will not bar an appeal by the Government of a sentence, at least where that appeal is premised on the existing record. *Id.* at 136-137.

The distinction between trial and sentencing procedures springs from the very different inquiries involved and determinations made at the two proceedings. The essential components of a traditional sentencing hearing – a lower standard of proof, an informal hearing where the rules of evidence do not apply and a wide ranging discretion in the sentencer to select an appropriate sentence – are fundamentally incompatible with the purpose of the Double Jeopardy Clause. When a decision has been reached after a hearing with these attributes "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'" *Bullington v. Missouri*, 451 U.S. at 443.

Justice Powell explained why this is so in his dissenting opinion in *Bullington* itself. There, Justice Powell noted that Double Jeopardy applies to proceedings on guilt or innocence because such questions involved "an objective truth." *Bullington v. Missouri*, 451 U.S. at 450 (Powell, J., dissenting). In contrast, "[t]he sentencer's function is not to discover a fact, but to mete out just deserts as he sees them." *Ibid.* Thus, while there is a rational way to review a factfinder's determination of "objective" fact, there is no "objective measure by which



the sentencer's decision can be deemed correct or erroneous . . . . " *Ibid.* Justice Powell reasoned that Double Jeopardy should not apply to sentencing because "the second jury's sentencing decision is as 'correct' as the first jury's." 451 U.S. at 451.<sup>4</sup>

In contrast, where a proceeding contains all the essential components of a criminal trial, and the factfinder is making a determination of historical fact, Double Jeopardy should apply. In that situation, not only has the jury been asked to determine the precise "objective" truth to which Justice Powell referred, but there is an "objective measure by which the . . . decision can be deemed correct or erroneous." 451 U.S. at 450. Moreover, since the state has no right to appeal an acquittal, no statutory procedure upsets the defendant's "expectation of finality in the original sentence."

Thus, in both the Due Process and Double Jeopardy areas, the Court has drawn a clear distinction between the constitutional rights applicable to trials on guilt or innocence and those applicable to traditional sentencing

---

<sup>4</sup> Not only do the hallmarks of a typical sentencing hearing make Double Jeopardy difficult to apply, but they undercut any expectation of finality a defendant might otherwise have in his sentence. Thus, one relevant hallmark the Court has examined to determine the applicability of Double Jeopardy is whether the state has been afforded the right to appeal a particular sentence. Where such a right exists, a defendant's "expectation of finality in the original sentence" is undercut and a new sentencing is permissible. *United States v. DiFrancesco*, 449 U.S. at 136-137, 139. See *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985).

hearings. In both areas, the Court has exempted traditional sentencing proceedings from the constitutional requirements which govern criminal trials. This exemption is not based on the label attached to the proceeding; instead, it is grounded in a functional analysis of the significantly different determinations being made.

**B. Where The Decision Made By The Factfinder At A Sentence Enhancement Trial Is Identical To That Made At A Trial On Guilt Or Innocence, And The Proceeding Has All The Hallmarks Of Trial, Double Jeopardy Must Apply.**

In this case, the sentence enhancement trial is identical to a formal guilt/innocence trial in all but name. The procedural hallmarks, substantive determination and penal consequences made at a strikes trial are identical to a trial on guilt or innocence.

Over the last 50 years the Court has, on many occasions, addressed the scope of constitutional protections to be applied to these types of proceedings. While the label attached to a sentence enhancement proceeding may be a factor in assessing the scope of constitutional protection to be applied, it is not dispositive. Instead, in making this assessment the Court has always taken the same functional approach discussed above, examining the substance of the proceeding and the nature of the determination made at that proceeding. The Court has applied this approach in connection with a series of constitutional rights – including the right to notice, counsel, confrontation, and to present evidence. Uniformly, the Court has rejected the proposition that the exceptions carved out for traditional sentencing hearings should be

extended to sentence enhancement trials. The Court's Double Jeopardy cases represent a straightforward application of this same approach.

1. **In holding that many constitutional protections available to a defendant at a criminal trial are equally available at a sentence enhancement trial, the Court routinely examines the substance and nature of the sentence enhancement proceeding.**

As noted above, the Court has exempted traditional sentencing decisions from many of the strict constitutional requirements which govern guilt/innocence trials. The Court has, however, consistently rejected the proposition that the exceptions carved out for traditional sentencing hearings should be extended to sentence enhancement trials. Instead, the Court has reached precisely the opposite conclusion, holding that many constitutional protections available to defendants at trial also apply to sentence enhancement trials. *See, e.g., Specht v. Patterson*, 386 U.S. 605 (1967); *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Chandler v. Fretag*, 348 U.S. 3 (1954). *See also Oyler v. Boles*, 368 U.S. 448 (1962).

In *Specht v. Patterson*, 386 U.S. 605, for example, the Court addressed a Colorado sentence enhancement statute. There, defendant was convicted of an offense which carried a maximum penalty of ten years in prison. The enhancement statute at issue authorized the trial judge to make a post-trial inquiry as to whether defendant posed a "threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. If the trial court found this was true, it could impose additional

punishment, including a life term. *Ibid.* This finding could be made without a formal hearing, without notice and based on psychiatric reports. 386 U.S. at 608. On appeal, petitioner argued that Due Process entitled him to notice of the charges and an opportunity to confront the evidence against him.

Before this Court, the state argued that the factual finding authorized by the statute was merely part of the "determination as to what sentence is imposed." *Specht v. Patterson*, No. 831, Brief for Respondent at 19. The post-trial proceeding "is not to convict, but one to impose sentence . . . ." *Id.* at 7. It was simply "a statute which permits imposition of a sentence." *Id.* at 13. Citing *Williams v. New York*, 337 U.S. 241, the state argued that the exemption applied to traditional sentencing hearings should extend to the enhancement trial as well. *Specht v. Patterson*, No. 831, Brief for Respondent at 8-13.

This Court explicitly rejected the proffered analogy to traditional sentencing hearings. Instead, the Court took a functional approach, looking beyond the nomenclature attached to the proceeding at issue. In the enhancement trial at issue there, the factfinder was performing a classic guilt/innocence function, making "a new finding of fact . . . that was not an ingredient of the offense charged." 386 U.S. at 608. The factfinder's role in making a "new finding of fact" on which the state hinged far greater punishment made the statute at issue in *Specht* "radically different" from the typical sentencing hearing considered in *Williams v. New York*, 337 U.S. 241. *Specht v. Patterson*, 386 U.S. at 608. Thus, Due Process rights to notice and confrontation - rights which *Williams* had established did



not apply to sentencing proceedings – would apply to the enhancement scheme at issue in *Specht*. *Id.* at 610-611.

The Court reached the same result in *Chandler v. Fretag*, 348 U.S. 3. There, the Court also rejected the proposition that recidivist enhancement trials should be treated the same as traditional sentencing hearings. *Chandler* involved a Tennessee enhancement statute which, like the statute in *Specht*, required the factfinder to make a new finding of fact at a sentence enhancement trial. Like *Specht*, the state hinged significant additional punishment on this new finding. 348 U.S. at 5, 8-9. On appeal, defendant argued he had been denied his Due Process right to be heard through counsel.

Before this Court, the state argued that the statute “goes to punishment only.” *Chandler v. Fretag*, No. 39, Brief for Respondent at 6. Once again the state cited *Williams v. New York*, 337 U.S. 237 for the proposition “that the procedural requirements of due process for sentencing are entirely different to those applicable to determining the guilt or innocence of a Defendant.” *Chandler v. Fretag*, No. 39, Brief for Respondent at 8. Once again, the state relied on *Williams* to argue that the constitutional rights applicable to a recidivist enhancement trial should be the same as those applicable to traditional sentencing hearings. *Chandler v. Fretag*, No. 39, Brief for Respondent at 8-9. Once again, however, this Court rejected the proffered analogy between sentence enhancement trials and traditional sentencing proceedings. 348 U.S. at 8-10. *Accord Oyler v. Boles*, 368 U.S. at 452 (Due

Process requirement of notice and an opportunity to be heard applies to West Virginia recidivist statute).<sup>5</sup>

The Court took an analytically similar approach in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There, the Court recognized that although a state had substantial latitude in defining both crimes and sentencing procedures, it could not avoid the constitutional protections applicable to criminal trials by the expedient of recasting certain elements of the crime as “sentencing factors.” 421 U.S. at 698-699. Instead, the reach of the constitution depended on “substance rather than . . . formalism . . . [and] requires an analysis that looks to the operation and effect of the law as applied and enforced by the State.” *Ibid.*

The common thread in *Specht*, *Chandler* and *Mullaney* is the Court’s refusal to give dispositive effect to the label attached to a particular proceeding in determining the appropriate reach of the federal constitution. Instead, the Court has properly focused on the “substance” of the proceeding as it is “applied and enforced by the State.”

---

<sup>5</sup> The Court’s decision in *Chewning v. Cunningham*, 368 U.S. 443 is similar. There, the state argued that a Virginia recidivist proceeding was simply a proceeding to impose a “stiffened penalty.” *Chewning v. Cunningham*, No. 63, Brief for Respondent at 18, 19-20. The Court rejected this argument, applying the same standard for appointment of counsel that it applied in guilt/innocence trials. 368 U.S. at 447.

2. The Court's Double Jeopardy cases take the same approach, holding Double Jeopardy applicable to sentence enhancement trials whose substance and nature are identical to a guilt/innocence trial.

*Bullington v. Missouri*, 451 U.S. 430 and *Arizona v. Rumsey*, 467 U.S. 203 fit seamlessly into the broad tapestry of *Specht*, *Chandler* and *Mullaney*. Both *Bullington* and *Rumsey* looked at the substance of the particular proceeding at issue to determine whether it would be treated as a traditional sentencing hearing or as a trial on the question of guilt or innocence.

To be sure, *Bullington* marked the first time the Court was faced with deciding whether the Double Jeopardy exception carved out for traditional normative sentencing hearings (the *Pearce/DiFrancesco* rule) would extend to enhancement trials containing all the hallmarks of a trial on guilt or innocence. In *Bullington*, the Court explicitly rejected extension of the *Pearce/DiFrancesco* rule to formal sentence enhancement trials.

There, defendant was convicted of murder. At a bifurcated hearing the state sought to prove the facts necessary for a death sentence. The jury imposed a life sentence. Defendant sought and received a new trial as to his underlying conviction. At the new trial, the state again sought to prove the facts necessary for a death sentence. Defendant argued that Double Jeopardy precluded the state from a second chance to prove its case.

Before this Court, Missouri proffered a mirror image of the arguments rejected in *Specht* and *Chandler*. Citing *North Carolina v. Pearce*, 395 U.S. 711, the state argued that

the scope of Double Jeopardy protections applicable to the sentence enhancement trial at issue in *Bullington* should be governed by the limited Double Jeopardy protections applicable to a traditional sentencing hearing. *Bullington v. Missouri*, No. 79-6740, Brief for Respondent at 9-18. The state cited *United States v. DiFrancesco*, 449 U.S. 117 and argued that the Double Jeopardy Clause did not apply to facts found at "sentencing" hearings. *Bullington v. Missouri*, No. 79-6740, Supplemental Brief of Respondent at 1-2.

As in *Specht* and *Chandler*, the Court once again rejected the argument that sentence enhancement trials and traditional sentencing hearings were functional equivalents. The fact that the hearing was a "sentencing hearing" was irrelevant; the key inquiry was whether the sentence proceedings had "the hallmarks of the trial on guilt or innocence." 451 U.S. at 439.<sup>6</sup>

Applying this functional approach, the Court noted that under Missouri law a separate hearing was required to establish the predicate facts. 451 U.S. at 438. At the hearing, the state was required to prove its case beyond a reasonable doubt. 451 U.S. at 438. Under state law, the

---

<sup>6</sup> The Court's refusal to afford dispositive weight to the label attached to the proceeding was not only consistent with *Specht*, *Chandler* and *Mullaney*, but the Court's longstanding observation that "in the Double Jeopardy context it is the substance of the action that is controlling, and not the label given that action." *United States v. DiFrancesco*, 449 U.S. at 142. Accord *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).



hearing involved opening statements, introduction of evidence, closing arguments and the sentencer was presented with only two sentencing options. 451 U.S. at 438 and n.10. The state had no right to appeal a contrary verdict. In concluding that Double Jeopardy did indeed apply to the Missouri sentencing hearing at issue, the Court observed that the state mandated procedures "differ[] significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing." 451 U.S. at 438.<sup>7</sup>

This observation was entirely accurate. None of the cases "where the Double Jeopardy Clause has been held inapplicable to sentencing" involved the hallmarks of a trial on guilt or innocence. See *United States v. DiFrancesco*, 449 U.S. 117; *North Carolina v. Pearce*, 395 U.S. 711; *Chaffin v. Stynchcombe*, 412 U.S. 17; *Stroud v. United States*, 251 U.S. 15 (1919). In fact, *Bullington* distinguished *DiFrancesco*, *Pearce*, *Chaffin* and *Stroud* precisely on this basis. 451 U.S. at 438-439, 441.

Equally important, though *Bullington* was a capital case, the Court's precedents reject the proposition that Double Jeopardy mandates one rule for capital cases and a different rule for non-capital cases. In *Stroud v. United States*, 251 U.S. 15, defendant was tried for a capital crime

<sup>7</sup> In the language of *Specht*, the penalty enhancement trial at issue in *Bullington* was "radically different" from the typical sentencing proceeding to which the state was analogizing. This difference existed not only with respect to the nature of the determination which was being made (as in *Specht*), but with the procedures associated with that determination as well.

and given a life sentence. He appealed and his conviction was reversed. At his retrial, the death sentence was imposed. Even though it was a capital case, *Stroud* found no Double Jeopardy bar to the increased sentence. 251 U.S. at 16-18.

Of course, had *Bullington* rested on the proposition that Double Jeopardy mandates one rule for capital cases and a different rule for non-capital cases, it would have had to overrule *Stroud*. Significantly, however, it did not. Instead, *Bullington* took pains to distinguish *Stroud* as a case in which the penalty trial – unlike *Bullington* – "did not have the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. at 439.

Nor is there anything in the text of the Double Jeopardy Clause itself, or the history of the Clause, which supports a distinction between capital and non-capital cases. The finality concerns of the Double Jeopardy Clause have never turned on the severity of a concededly penal consequence. See, e.g., *In re Bradley*, 318 U.S. 50 (1943) (Double Jeopardy applicable to a \$500 fine); *Ex parte Lange*, 18 Wall. 163 (1874) (Double Jeopardy applicable to a \$200 fine). Instead, they properly turn on the nature of the proceeding which leads to that penal consequence.

Nothing in *Bullington* suggests it departed from this basic approach. Indeed, as Justice Powell noted in his dissenting opinion in *Bullington* itself, "the Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." 451 U.S. at 451. Justice Powell was correct.

*Bullington* did not rely on the Court's Eighth Amendment "death is different" jurisprudence, it relied on *Specht v. Patterson*, 386 U.S. 605. *Bullington v. Missouri*, 451 U.S. at 446.

This Court has never departed from *Bullington*. Only three years later, Justice O'Connor wrote for a 7-2 majority and applied *Bullington*'s "hallmarks of trial" test to the Arizona capital sentencing scheme. *Arizona v. Rumsey*, 467 U.S. 203. In *Rumsey*, the Court held Double Jeopardy applicable to a sentence enhancement trial where the state had the burden of proof beyond a reasonable doubt, the rules of evidence applied, and the factfinder had only two options.

Moreover, in a variety of other contexts applying the Double Jeopardy Clause, the Court has again and again looked at the hallmarks of a particular proceeding and the role of the decisionmaker in determining whether Double Jeopardy applied to that proceeding. See, e.g., *United States v. Hudson*, \_\_\_ U.S. \_\_\_, 118 S.Ct. 488, 495-496 (1998) (Double Jeopardy does not bar criminal proceedings based on conduct which was the subject of an earlier monetary penalty where the monetary penalty was determined in an "administrative determination" rather than "a judicial trial," and it involved no imprisonment); *United States v. Ursery*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 2135 (1996) (in concluding that Double Jeopardy did not apply to civil forfeitures, the Court examined the "procedural mechanisms governing forfeitures" including the absence of any notice requirement, the availability of a "summary administrative procedure" to resolve the issue and a minimal "probable cause" burden of proof); *Witte v. United States*, 515 U.S. 389, 400-401 (1995) (Double Jeopardy does

not bar conviction for an offense based on conduct considered at sentencing in an unrelated case, where the prior use of the conduct did not expose the defendant to additional punishment "outside the range authorized by statute" and "authoriz[ed] the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial . . . ."); *United States v. Dixon*, 509 U.S. 688, 696 (1993) (Double Jeopardy applies to contempt hearing where the factfinder's role is to determine culpability for a "crime in the ordinary sense," and defendant had a right to notice of the charges, present a defense, assistance of counsel and proof beyond a reasonable doubt.)<sup>8</sup>

---

<sup>8</sup> That Double Jeopardy may apply to a particular proceeding does not mean that other rights applicable at a guilt/innocence trial must apply. To the contrary, the Court has made clear that Double Jeopardy has a broader reach than many other rights, such as the right to a jury trial. Compare *Walton v. Arizona*, 497 U.S. 639 (1990) (no right to jury trial at Arizona capital sentencing proceeding) with *Arizona v. Rumsey*, 467 U.S. 203 (Double Jeopardy applies to Arizona capital sentencing proceeding); compare *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in juvenile proceedings) with *Breed v. Jones*, 421 U.S. 519 (1975) (Double Jeopardy applies to juvenile proceedings); compare *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (no right to jury trial for offense punishable by six months in prison or less) with *Robinson v. Neil*, 409 U.S. 505 (1973) (Double Jeopardy applies to petty crime prosecutions).

This result is sound. There are varied proceedings in which there is no constitutional right to a jury trial. A conclusion that the jury trial right does not attach to these proceedings does not mean that the state is permitted multiple opportunities to prove its case. The Court has recognized this precise point. See *Breed v. Jones*, 421 U.S. at 528, n.10.



From a practical perspective, the functional approach applied in *Bullington* and its progeny makes eminent sense. Those cases where the Court has held Double Jeopardy inapplicable to sentencing proceedings uniformly involve a normative determination which is, and should be, outside the scope of the Double Jeopardy Clause. In that situation, "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'" *Bullington v. Missouri*, 451 U.S. at 443. Put another way, Double Jeopardy does not apply to traditional discretionary sentencing because there is no "objective measure by which the sentencer's decision can be deemed correct or erroneous . . . ." *Bullington v. Missouri*, 451 U.S. at 450 (Powell, J., dissenting).

When the factfinder is not making a normative determination, however, but is instead making an objective determination of historical fact, this rationale for refusing to extend Double Jeopardy simply does not apply. Thus, when a criminal statute (1) exposes a defendant to significantly greater punishment if the state proves certain predicate facts, (2) provides for a fully adversarial trial on those facts just as in a guilt/innocence trial, including the requirement of proof beyond a reasonable doubt, and (3) sharply confines the factfinder's determination to "true" or "false," the state has effectively dispensed with those critical attributes of a "sentencing hearing" on which this Court has always relied to find that Double Jeopardy does not apply. In this situation, a finding of insufficient evidence by either the factfinder or the appellate court does indeed "constitute a decision to the effect that the

government has failed to prove its case." *Burks v. United States*, 437 U.S. at 15.

In sum, while the Court has carved out an exception to the general scope of the Double Jeopardy Clause for traditional sentencing proceedings, the rationale for that exception has no application to formal sentence enhancement trials. *Bullington* and *Rumsey* recognized this basic point. Where the factfinder at a sentence enhancement trial must make an objective finding of fact which exposes a defendant to significantly increased punishment, and where that finding is deemed so important that the attendant hearing has all the hallmarks of a guilt/innocence trial, the state is not entitled to repeated chances to prove its case after the defendant has once been acquitted.

**C. In Deciding Whether Double Jeopardy Applies To A Sentence Enhancement Trial, The Vast Majority of Jurisdictions Apply *Bullington's* "Hallmarks Of Trial" Test.**

Both *Bullington* and *Rumsey* involved capital sentencing proceedings. This Court has not had occasion to hold that the analysis in those cases applied equally to non-capital cases. See *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994); *Lockhart v. Nelson*, 488 U.S. 33, 37-38, n.6 (1988). The Court has noted on a number of occasions, however, that state courts "hold the initial responsibility for vindicating constitutional rights." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.16 (1986); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Thus,

though certainly not dispositive on the question, the considered opinions of lower courts throughout the country should not be ignored in this Court's decisionmaking process. See *McKeiver v. Pennsylvania*, 403 U.S. at 548-549 (in determining the scope of the right to a jury trial, the Court examines the weight of authority from the lower courts); *Baldwin v. New York*, 399 U.S. 66, 71-72 and n.18 (1970) (same); *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (in determining the scope of Double Jeopardy Clause, the Court examines the weight of authority from the lower courts); *Moore v. Missouri*, 159 U.S. 673, 676-677 (1895) (same).

In her dissenting opinion below, Justice Werdegar – joined by Justices Mosk and Kennard – correctly concluded that the majority of jurisdictions have embraced the functional “hallmarks of trial” approach set forth in *Bullington*. *People v. Monge*, 16 Cal.4th at 869; JA 114. Thus, a holding that the *Bullington* formulation applies to sentence enhancement trials would not impact existing practice in the vast majority of jurisdictions, it would simply confirm it.

### 1. The majority rule.

The general rule throughout the country is that when an enhancement proceeding provides procedures and requires proof “like the trial on the question of guilt or innocence,” Double Jeopardy applies and a finding of insufficient evidence will preclude retrial. See, e.g., *State v. Hennings*, 100 Wash.2d 379, 670 P.2d 256, 257-262 (Wash. 1983); *Cooper v. State*, 631 S.W.2d 508, 514 (Tex. 1982); *People v. Quintana*, 634 P.2d 413, 417-419 (Colo. 1981); *State*

*v. Hulse*, 785 S.W.2d 373, 376 (Tenn. 1989); *Reed v. State*, 581 S.W.2d 145, 149-151 (Tenn. 1978); *Bowman v. State*, 314 Md. 725, 552 A.2d 1303, 1309-1310 (Md. 1989); *Davis v. Commonwealth*, 899 S.W.2d 487, 490 (Ky. 1995); *Poore v. State*, 685 N.E.2d 36, 39 (Ind. 1997); *State v. Aspen*, 412 N.W.2d 881, 883-885 (S.D. 1987). Cf. *Debussi v. State*, 453 So.2d 1030, 1033-1034 (Miss. 1984) (applying *Bullington*'s hallmarks of trial test to conclude that Double Jeopardy Clause of Mississippi Constitution barred retrial of enhancement allegation); *State v. Ledbetter*, 240 Conn. 317, 692 A.2d 713, 717-718 (1997) (state concedes Double Jeopardy applies to habitual offender statute which is entirely trial-like, but state supreme court does not address the issue because it was waived).

The Washington Supreme Court's decision in *State v. Hennings*, 670 P.2d 256, is typical. There, defendant was charged with robbery and a habitual offender allegation. The factfinder at trial acquitted on the habitual offender charge. Under Washington law, a habitual offender finding exposed defendant to a life term. The state was required to prove the allegation beyond a reasonable doubt at a formal trial and the factfinder was being asked to decide a straightforward question of historical fact. Under these circumstances, the court “focus[ed] on the nature of the proceeding,” applied *Bullington*, and concluded that Double Jeopardy barred a retrial: “it is not the labels placed upon those proceedings that is important, but the opportunity the State had to present its evidence against the defendant.” 670 P.2d at 261.

Of course, as Justice Werdegar also noted, application of *Bullington*'s hallmarks of trial test will not always result in a conclusion that Double Jeopardy applies to the



proceeding at issue. *People v. Monge*, 16 Cal.4th at 866; JA 109. The central purpose of the test is to distinguish trial-like proceedings at which Double Jeopardy should apply from the type of informal hearings where "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'" *Bullington v. Missouri*, 451 U.S. at 443. Thus, a significant number of courts have faithfully applied *Bullington's* hallmarks test and held Double Jeopardy inapplicable to enhancement proceedings which did **not** provide procedures and require proof "like the trial on the question of guilt or innocence." See, e.g., *People v. Sailor*, 65 N.Y.2d 224, 235 (N.Y. 1985); *People v. Levin*, 157 Ill.2d 138, 623 N.E.2d 317, 325-327 (Ill. 1993); *Olsen v. State*, 691 So.2d 17, 18 (Fla. 1997); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385, 387-388 (N.C. 1985); *State v. Sowards*, 147 Ariz. 156, 709 P.2d 513, 515-516 (1985); *Fitzpatrick v. State*, 194 Mont. 310, 638 P.2d 1002, 1017 (1981).<sup>9</sup>

<sup>9</sup> The federal courts reflect a similar pattern. Of course, federal courts may no longer resolve this issue in federal habeas proceedings because of the new rule bar of *Teague v. Lane*, 489 U.S. 288 (1989). See *Caspari v. Bohlen*, 510 U.S. 383. Nevertheless, prior to *Caspari*, the weight of authority in the federal courts applied *Bullington's* hallmarks of trial test. When an enhancement proceeding provided procedures and required proof like the trial on the question of guilt or innocence, Double Jeopardy applied. See, e.g., *Bohlen v. Caspari*, 979 F.2d 109, 113 (8th Cir. 1992), *overruled on other grounds* *Caspari v. Bohlen*, 510 U.S. 383; *Durosko v. Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 495 U.S. 907 (1990); *Nelson v. Lockhart*, 828 F.2d 446, 449-451 and n.7 (8th Cir. 1987), *overruled on other grounds* *Lockhart v. Nelson*, 488 U.S. 33; *Briggs v. Procunier*, 764 F.2d 368, 371-373 (5th Cir. 1985); *French v. Estelle*, 692 F.2d 1021, 1023-1025

*People v. Sailor*, 65 N.Y.2d 224 is typical of these cases. There, the New York Court of Appeals applied the *Bullington* formulation and concluded that Double Jeopardy would not apply to New York's persistent felon statute. That statute allowed for enhanced punishment if the court 1) found that defendant had committed two or more prior felonies and 2) reached the subjective conclusion that extended imprisonment was warranted by defendant's "history and character . . . and the nature and circumstances of his criminal conduct . . . ." 65 N.Y.2d at 235.

In concluding that Double Jeopardy did not bar a retrial, the court noted that the procedural safeguards associated with persistent felon status "are in many respects less like the procedural safeguards at trial than those employed in [*Bullington*] . . . ." 65 N.Y.2d at 235. The broad inquiry into defendant's "history and character" need only be proved by a preponderance of the evidence, the rules of evidence did not apply to this inquiry, and a defendant wishing to dispute the charge had to specify what he was disputing and what evidence he planned to use. 65 N.Y.2d at 235. Moreover, in determining whether defendant was a habitual offender, the factfinder had – by statute – a broad discretion to refuse to make the finding even where the evidence compelled it. 65 N.Y.2d at 234.<sup>10</sup>

(5th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983). When the proceeding does not contain the hallmarks of trial, Double Jeopardy does not apply. See, e.g., *Wilmer v. Johnson*, 30 F.3d 451, 458 (3d Cir.), *cert. denied*, 513 U.S. 970 (1994).

<sup>10</sup> Accord *People v. Levin*, 623 N.E.2d at 325-327 (Double Jeopardy inapplicable to state procedure where rules of evidence did not apply and "[t]he state had no burden to prove

It is thus clear that in deciding whether Double Jeopardy applies to their enhancement statutes, courts throughout the country have relied upon the "hallmarks of trial" framework articulated in *Bullington*. While the conclusions may vary depending on the particular hallmarks involved, the analysis remains the same; these courts have made a determination as to whether the proceedings were sufficiently trial-like to invoke Double Jeopardy protections. Application of the *Bullington* approach would simply confirm this practice.<sup>11</sup>

---

a defendant's prior convictions beyond a reasonable doubt."); *Olsen v. State*, 691 So.2d at 18 (permitting retrial where habitual offender statute – Fla. Stat. § 775.084(3)(a)(4) – permitted state to prove facts "by a preponderance of the evidence"); *State v. Jones*, 336 S.E.2d at 387-388 (permitting retrial where statute allowed state to prove facts by a preponderance of the evidence, rules of evidence did not apply and sentencer exercised subjective discretion in reaching conclusion); *State v. Sowards*, 709 P.2d at 515 (permitting retrial where enhancement statute permitted state to prove facts by a preponderance of the evidence and where factfinder retained broad sentencing discretion). Cf. *Fitzpatrick v. State*, 638 P.2d at 1017 (Double Jeopardy not applied to capital sentencing which lacks the hallmarks of trial and allows state to prove facts by a preponderance of the evidence).

<sup>11</sup> Without specifying whether the bar was premised on the Double Jeopardy Clause, a number of other jurisdictions have held that insufficient evidence bars retrial of sentence enhancement allegations containing all the hallmarks of trial. See, e.g., *State v. Barlowe*, 242 Iowa 714, 46 N.W.2d 725, 731 (1951); *Cooper v. State*, 810 P.2d 1303, 1306 (Okla. 1991). Other states have reached this same result by relying on state statutes. See, e.g., *State v. Theriault*, 187 Wis.2d 125, 522 N.W.2d 254, 258 (1994). In these states too, the hallmarks of trial test would not alter existing practice.

## 2. The minority rule.

Three state jurisdictions have addressed the issue and departed from the majority rule described above. *State v. Cobb*, 875 S.W.2d 533 (Mo. 1994); *People v. Aragon*, 116 N.M. 267, 861 P.2d 948 (N.M. 1993); *Durham v. State*, 464 N.E.2d 321 (Ind. 1984).

Two points are worth noting. First, both *Cobb* and *Durham* contain strong dissents on this very issue. See *State v. Cobb*, 875 S.W.2d at 537-539 (Limbaugh, J., dissenting); *Durham v. State*, 464 N.E.2d at 325-326 (DeBruler, J., dissenting). Second, the Indiana Supreme Court has overruled the 3-2 decision in *Durham*, applied *Bullington's* hallmarks of trial test, and unanimously held that Double Jeopardy does apply to Indiana's trial-like sentence enhancements. *Poore v. State*, 685 N.E.2d at 39; *Bell v. State*, 622 N.E.2d 450, 456 (Ind. 1993).<sup>12</sup>

---

Similarly, in those states which have not yet addressed the question, existing practice would also be unaffected. Most have habitual offender proceedings which either permit findings without trial-like hallmarks, such as proof beyond a reasonable doubt, or require a sentencing-like subjective determination to be made as to the "appropriateness" of a habitual offender finding. See, e.g., Alaska Stat. § 12.55.025(i) and 12.55.145; Mich. Comp. Laws Ann. § 769.13 and *People v. Zinn*, 217 Mich.App. 340, 551 N.W.2d 704, 707-708 (1996); Minn. Stat. Ann. § 609.15 and *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996); *Clark v. State*, 851 P.2d 426, 427-429 (Nev. 1993); N.D. Crim. Code § 12.1-32-09; Or. Rev. Stat. § 161.725 and *State v. Sanders*, 35 Or.App. 503, 582 P.2d 22, 24 (1978); 42 Pa. Cons. Stat. Ann. § 9714; R.I. Gen. Laws § 12-19-21.

<sup>12</sup> Two federal circuits – one in dictum and one in an alternative holding – have departed from the majority rule. See *Denton v. Duckworth*, 873 F.2d 144, 147-148 (7th Cir. 1989)



**D. Because California's Sentence Enhancement Scheme Contains All The Hallmarks Of A Guilt/Innocence Trial, Requires The Factfinder To Convict Or Acquit Of The Charge And Exposes The Defendant To Significant Enhanced Punishment, Double Jeopardy Applies To These Proceedings.**

Applying the *Bullington* formulation to the California sentence enhancement scheme is relatively straightforward. The three-strikes charge at issue here provides a useful example.

When a defendant is convicted of an offense in California, the court imposes sentence by selecting from among three legislatively prescribed terms. *See* Cal. Penal Code § 1170(a)(3). Here, for example, the trial court was required to choose between a "three, five or seven year [ ]" term for the underlying offense. Cal. Health & Safety Code § 11361(a). The court selected the middle term – five years. (RT 239; JA 19.)

Pursuant to the three strikes law, when the state proves that a defendant has one prior conviction which qualifies as a strike, the sentence "shall be twice the term otherwise provided as punishment for the current felony conviction." Cal. Pen. Code § 667(e)(1). When the state proves that a defendant has two prior convictions which qualify as strikes, the sentence is the greater of (1) "three times the term otherwise provided as punishment" or (2) "[i]mprisonment in the state prison for 25 years." Cal. Pen. Code § 667(e)(2)(A)(i) and (ii).

---

(dictum re Indiana statute); *Linam v. Green*, 685 F.2d 369, 373, 376 (10th Cir. 1982) (alternative holding).

Because of the extraordinarily severe penal consequences which follow a guilty verdict on these allegations, the California legislature has made a considered judgment that trials on these allegations be conducted with the same strict procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence.

For example, in connection with the strikes allegation in this case – and as with any criminal offense – the law requires that defendants be given formal notice of and arraignment on the charges. *See* Cal. Pen. Code § 667(c), (g); Pen. Code § 1025. Similarly, as with any criminal offense, the defendant is entitled to a formal adversarial trial on the allegation. This includes not only the right to confront and present evidence, but the right to a jury trial as well. *See* Cal. Pen. Code §§ 969<sup>1/2</sup>, 1025, 1158; *People v. Reed*, 13 Cal.4th 217, 228, n.5 (1996); *In re Yurko*, 10 Cal.3d 857, 862-863 (1974). Unless a party moves to bifurcate trial on the strike allegations, the jury trial on these charges will occur at the same time as trial on the charged offenses. *See People v. Calderon*, 9 Cal.4th 69 (1994).

At this trial, whether bifurcated or not, the formal rules of evidence apply. *See People v. Meyers*, 5 Cal.4th 1193, 1201 (1993). Moreover, defendants are entitled to a special verdict on each prior conviction or prison term alleged. *See* Pen. Code § 1158. The jury has only two choices; it must either acquit of the charge or find that the defendant suffered the prior conviction. *Ibid.*

Finally, the prosecution must prove each element of a prior conviction habitual offender allegation true beyond a reasonable doubt. *People v. Tenner*, 6 Cal.4th 559, 566

(1993); *People v. Morton*, 41 Cal.2d 536, 539 (1953). In California, the state's obligation to "shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt" is a "cardinal principle of criminal jurisprudence." *People v. Tenner*, 6 Cal.4th at 566. If the state fails to meet this burden, and the defendant is acquitted of the allegation, the state may not appeal. Cal. Pen. Code § 1238; *People v. Smith*, 33 Cal.3d 596, 600 (1983) (state may appeal only when authorized by statute).

Of course, this constellation of protections is identical to that provided during the trial on guilt or innocence. Justice Chin, who wrote for the three-justice plurality below, recognized that because the defendant had a right to counsel, notice, an opportunity to be heard, and proof beyond a reasonable doubt a "section 1025 trial at which a California jury determines the truth of a prior conviction allegation . . . has 'the hallmarks of the trial on guilt or innocence.'" *People v. Monge*, 16 Cal.4th at 836; JA 60. Justice Werdegarr, writing for the three-justice dissent, agreed. *People v. Monge*, 16 Cal.4th at 870; JA 116-117. Thus, as the California Supreme Court has itself concluded, the procedures which attend a sentence enhancement trial under California law are in all respects **identical** to those that apply to the trial on guilt and innocence.

The role of the factfinder in a sentence enhancement trial is also identical to that of the factfinder in the guilt/innocence trial. As Justice Chin recognized, at an enhancement trial – just as at a trial on guilt – the "trier of fact faces a choice between two alternatives." *People v. Monge*, 16 Cal.4th at 836; JA 61. Justice Werdegarr once again

agreed, noting that the jury "is limited to two alternatives . . . ." *People v. Monge*, 16 Cal.4th at 870; JA 116.

On both scores, the formal trial on enhancements contrasts starkly with a traditional sentencing hearing in California. First, the sentencer's role at a typical California sentencing hearing is completely different from the factfinder's role at a typical sentence enhancement trial.

At a typical sentencing hearing, the trial judge considers the information presented and exercises a "broad discretion to determine whether an eligible defendant is suitable for probation . . . ." *People v. Welch*, 5 Cal.4th 228, 233 (1993). If probation is imposed, the court has an equally broad discretion to determine "what conditions should be imposed." *Ibid.* If probation is not imposed, the court must decide what base term to pick out of the range provided by the legislature and – if more than one offense is involved – whether the terms should be consecutive or concurrent. Cal. Pen. Code § 1170(a)(3), (b); California Rule of Court 420, 425. These choices too are made in the sound exercise of the trial court's discretion. *People v. Burnes*, 224 Cal.App.3d 1222, 1234 (1990); *People v. Gulbrandsen*, 209 Cal.App.3d 1547, 1552 (1989). In making these discretionary decisions, the court is guided by a list of non-inclusive sentencing considerations in the California Rules of Court.<sup>13</sup>

<sup>13</sup> For example, Rule 421 sets forth "[c]ircumstances in aggravation." Similarly, Rule 423 sets forth "[c]ircumstances in mitigation." The sentencing considerations set forth in these rules are used as a guide in both selecting the base term and choosing between consecutive and concurrent terms. Rule 425(b). Both court rule and case-law establish that these



Thus, the nature of the determinations being made at sentencing are far different from the determinations being made at a sentence enhancement trial. There is a corresponding difference in the procedures used in the two proceedings. For example, the sentencing considerations on which the trial court will rely in exercising its broad discretion need only "be established by a preponderance of the evidence." California Rule of Court 439. Moreover, in contrast to formal sentence enhancement allegations, these sentencing considerations need not be pled. See *People v. Hernandez*, 46 Cal.3d 194, 206 (1988).

In exercising its discretionary sentencing choices, the trial court considers a report prepared by the probation officer. Cal. Pen. Code § 1203(b)(1); California Rule of Court 411(a). This probation report may contain "extrajudicial material" including hearsay; the rules of evidence do not apply to such reports. *People v. Lockwood*, 253 Cal.App.2d 75, 81-82 (1967); California Rule of Court 411.5. Defendant does not have any right to cross-examine the person who prepared the report. *People v. Smith*, 38 Cal.3d 945, 960 (1985). The People also have a limited right to appeal sentences and/or seek review by extraordinary writ. Cal. Pen. Code § 1238(a)(6), (10), and (d).

Under these circumstances, it is perfectly appropriate to apply *DiFrancesco* and *Pearce* and deny Double Jeopardy protection to the typical California sentencing proceeding. Given the trial court's discretion to hear a wide ranging type of evidence and fashion an appropriate

---

sentencing considerations are non-inclusive. Rule 408(a); *People v. Gonzales*, 208 Cal.App.3d 1170, 1172 (1989).

punishment by choosing among probation or the range of sentences normally available under the determinate sentencing law, "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'" *Bullington v. Missouri*, 451 U.S. at 443.

This same conclusion does not apply to sentence enhancement trials as they are conducted in California. Where a factfinder hears evidence in a fully adversarial forum, chooses between two – and only two – alternatives, and decides that the state has presented insufficient evidence to establish beyond a reasonable doubt a sentence enhancement, the factfinder has indeed reached "a decision to the effect that the government has failed to prove its case." As such, a finding of insufficient evidence to sustain the enhancement bars a second trial on that allegation. *Burks v. United States*, 437 U.S. at 11.

This is especially true here, where there is no provision for an appeal by the People and where defendant did not successfully attack his underlying conviction on appeal. In either of those situations defendant might not have a legitimate expectation of finality. Here, however, the nature of the determination being made, the constellation of protections afforded the defendant, and the inability of the People to appeal an acquittal, all support a legitimate "expectation of finality" within the meaning of the Double Jeopardy Clause. *United States v. DiFrancesco*, 449 U.S. at 139. Thus, Double Jeopardy should apply.

The state court reached a contrary result for three reasons. First, it believed *Bullington* applied only to capital cases. *People v. Monge*, 16 Cal.4th at 836-837; JA 61.

Second, the court found it relevant that many of the procedural protections applied to sentence enhancement trials in California were statutory in origin. *People v. Monge*, 16 Cal.4th at 836-837; JA 61-62. Finally, the sentence enhancement factfinder was confined to determining whether certain historical facts had been proven rather than whether death was appropriate. *People v. Monge*, 16 Cal.4th at 837; JA 62. None of these distinctions justify providing the state with numerous chances to prove its case.

The first point – that *Bullington* is limited to capital cases – completely ignores *Stroud v. United States*, 251 U.S. 15. As discussed above, *Stroud* held Double Jeopardy inapplicable to a capital case where the sentencing did not have the hallmarks of trial. 251 U.S. at 16-18. *Bullington* did not overrule *Stroud*; it specifically distinguished *Stroud* as a case in which the penalty trial “did not have the hallmarks of the trial on guilt or innocence.” *Bullington v. Missouri*, 451 U.S. at 439. *Bullington*’s treatment of *Stroud* cannot be squared with the proposition that *Bullington* intended to create a Double Jeopardy analysis unique to capital cases.

In support of its contrary position, the California Supreme Court relied on this Court’s decision in *Caspari v. Bohlen*, 510 U.S. 383. *People v. Monge*, 16 Cal.4th at 841-843. In *Caspari* the question was whether Double Jeopardy barred retrial on a Missouri habitual offender allegation. The Court was careful to note that the only consequence of a true finding on the allegation at issue was that the judge would impose sentence rather than the jury. “A [true] finding . . . shifts the sentencing decision

from the jury to the judge but does not alter the authorized sentencing range.” 510 U.S. at 386-387.

Because the case came to the Court on collateral review of a state conviction, the Court faced the threshold question whether relief was barred by the new rule doctrine of *Teague v. Lane*, 489 U.S. 288. *Caspari v. Bohlen*, 510 U.S. at 388-389. The Court observed that as of the date the defendant’s conviction became final – January 2, 1986 – a number of lower courts had disagreed whether *Bullington* applied outside the capital context. See *Caspari v. Bohlen*, 510 U.S. at 394-395. Since the merits of this issue were susceptible to debate among reasonable minds, a ruling in defendant’s favor would have violated *Teague*. 510 U.S. at 395. See *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (differing positions by lower courts supports *Teague* bar). Thus, the Court “had no occasion to decide” the merits of the issue. 510 U.S. at 397.

Given the particular sentence enhancement involved in *Caspari*, the retroactivity bar in that case bears little similarity to the issue here. The defendant there was asking this Court to apply Double Jeopardy to a finding which was missing a critical hallmark of the trial on guilt or innocence. Unlike a guilt/innocence trial, the finding at issue in *Caspari* did not expose the defendant to any additional punishment outside the range otherwise authorized for the underlying offense. A conclusion that Double Jeopardy applied to the non-punitive finding at issue in *Caspari* would not only have ignored a critical fact that makes formal sentence enhancement trials “radically different” from traditional sentencing hearings, but it would have departed from *Specht*, *Chandler* and *Bullington* as well. See *McMillan v. Pennsylvania*, 477 U.S. at 88



(refusing to apply Due Process requirement of proof beyond a reasonable doubt to a factual finding which did not expose the defendant to any additional punishment but "operated solely to limit the sentencing court's discretion within the range already available to it without the . . . finding . . . ") The retroactivity analysis in *Caspari* does not inform the merits of this case.<sup>14</sup>

The state court's second observation – that many of the procedural protections applied to California sentence enhancement trials are statutory in origin – is of little consequence. It is true that the California legislature has enacted a number of the procedural protections which make the enhancement trial identical to that on the question of guilt or innocence. This is irrelevant to the Double Jeopardy question for two reasons.

First, as *Specht*, *Chandler* and *Boles* make clear, many of these protections – such as notice, confrontation and the right to be heard – may be required by Due Process. More important, in *Bullington* itself the state made this

---

<sup>14</sup> The state court concluded that because reasonable minds had differed in January of 1986, the decision in this case was also "consistent with constitutional standards." *People v. Monge*, 16 Cal.4th at 842. This misapprehends the nature of a *Teague* retroactivity bar. As this Court has made clear repeatedly, a defendant may be both correct on the merits and barred under *Teague*. Compare *O'Dell v. Netherland*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1969 (1997) (*Simmons* claim is *Teague* barred) with *Simmons v. South Carolina*, 512 U.S. 154 (1994) (*Simmons* claim correct on merits); *Lambrix v. Singletary*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1517 (1997) (*Espinosa* claim *Teague* barred) with *Espinosa v. Florida*, 505 U.S. 1079 (1992) (*Espinosa* claim correct on merits); *Sawyer v. Smith*, 497 U.S. 227 (1990) (*Caldwell* claim *Teague* barred) with *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (*Caldwell* claim correct on merits).

very argument, pointing out that the beyond a reasonable doubt standard of proof set forth in the Missouri statute was not required by the federal constitution. *Bullington v. Missouri*, No. 79-6740, Brief for Respondent at 10, n.17. Nor was the right to a jury trial at sentencing constitutionally premised. The lesson of *Bullington* is that the Double Jeopardy analysis depends not on the source of the procedural protections, but on their substance.<sup>15</sup>

The state court's final observation – on the factfinder's role – actually makes the case for application of the Double Jeopardy Clause stronger. The state court correctly noted a distinction between the determination made at a California sentence enhancement trial and a Missouri death penalty trial. In the sentence enhancement trial, the factfinder is confined to determining defendant's guilt of a particular allegation. In contrast, at the capital sentencing hearing involved in *Bullington*, the factfinder considers "a broad range of aggravating and mitigating circumstances," determines whether death is appropriate and is permitted to "reject a longer sentence even if its factual determinations support the sentence." *People v. Monge*, 16 Cal.4th at 837; JA 62.

---

<sup>15</sup> This approach is entirely consistent with the Court's longstanding practice. That a procedure may not be constitutionally compelled does not mean that if it is provided, it need not meet constitutional standards.

For example, the federal constitution does not require a state to include malice in its definition of murder. *Patterson v. New York*, 432 U.S. 197, 198 (1977). If a state chooses to do so, however, Due Process requires that the state shoulder the burden of proving that element beyond a reasonable doubt. *Id.* at 215-216. See *Mullaney v. Wilbur*, 421 U.S. 684.

Far from distinguishing *Bullington*, these observations actually make the California sentence enhancement trial more like the guilt/innocence trial than the death penalty proceedings involved in *Bullington* itself. Justice Powell's dissent in *Bullington* makes this precise point.

In Justice Powell's view, the statutory scheme in *Bullington* was like more typical sentencing – and unlike a trial on guilt or innocence – precisely because under Missouri law “juries are told that they can ignore the state's evidence.” 451 U.S. at 452, n.4. Justice Powell argued that under such a scheme “there is significantly less reason to assume [from an acquittal] that the State failed to prove its case” and “less reason to consider . . . unfair [a] second bite at the apple.” *Ibid.*

Justice Powell's observations explain why this is a stronger case than *Bullington* for application of Double Jeopardy. Unlike *Bullington*, the factfinder here was not told it could simply ignore the state's evidence. Thus, it is even clearer in this case that the acquittal necessarily means “that the State failed to prove its case.” 451 U.S. at 452, n.4.

None of the reasons put forth by the lower court for refusing to apply *Bullington* are persuasive. Unlike *Pearce*, this case does not involve a new sentencing hearing after a successful appellate attack on the underlying conviction. Unlike *DiFrancesco*, this case does not involve the state's appeal of a sentence.

Indeed, but for the fortuity that the trial court here did not realize the evidence was insufficient, defendant would have been acquitted at trial and the state could not have appealed. As this Court has noted, however, “it

should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient.” *Burks v. United States*, 437 U.S. at 11. Here too “it should make no difference” that the appellate court found the evidence insufficient. Whatever the source of this finding, the state is not entitled to ignore it, empanel a second factfinder and try again.

---

### CONCLUSION

The three strikes trial in this case was not a dress rehearsal. The state was given one fair opportunity to offer whatever proof it could on the prior conviction allegation. It should not be entitled to a second, third or fourth. The decision of the California Supreme Court should be reversed.

Respectfully submitted,

CLIFF GARDNER\*  
KATHRYN E. COLLIER  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109  
(415) 922-9404

*Counsel for Petitioner*

\* *Counsel of Record*



## APPENDIX

**§ 667. Habitual criminals; enhancement of sentence; amendment of section**

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This *subdivision* shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this *subdivision* to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this *subdivision* by a statute passed by majority vote of each house thereof.

(4) As used in this \* \* \* *subdivision* "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

\* \* \* (5) This *subdivision* \* \* \* shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.



App. 2

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

App. 3

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

**Additions or changes indicated by  
underline; deletions by asterisks \* \* \***

(1) Any offense defined in subdivision (c) of section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

App. 4

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) a conviction in another jurisdiction for an offense that if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense

App. 5

listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but



shall commence at the time the person would otherwise have been released from prison.

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(Amended by Stats. 1989, c. 1043, § 1; Stats. 1994, c. 12 (A.B.971), § 1, eff. March 7, 1994.)

#### § 1170.12. Prior felony conviction; enhancement

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided

App. 8

in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) if there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be

App. 9

made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is



(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined as paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any

agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

(Added by Initiative Measure (Prop. 184, § 1, approved Nov. 8, 1994).)

---

**§ 1192.7. Plea bargaining; limitation; definitions; amendment of section**

(a) Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing,



administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phenylcyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) *carjacking*; any attempt to commit a crime listed in this subdivision other than an assault; and (20) [sic] *any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense.*

(d) As used in this section, "bank robbery" means to take or attempt to take, by force of violence, or by intimidation from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

As used in this subdivision, the following terms have the following meanings:

(1) "Bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust

company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(2) "Savings and loan association" means any federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any federal credit union as defined in Section 2 of the Federal Credit Union Act.

(3) "Credit union" means any federal credit union and any state-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

(e) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(Amended by Stats. 1986, c. 1299, § 11; Stats. 1986, c. 489, § 1; Stats. 1988, c. 89, § 2; Stats. 1988, c. 432, § 2; Stats. 1989, c. 1043, § 2; Stats. 1989, c. 1044, § 2.5; Stats. 1993, c. 588 (A.B.327), § 1; Stats. 1993, c. 610 (A.B.6), § 16, eff. Oct. 1, 1993; Stats. 1993, c. 610 (A.B.6), § 16.5, eff. Oct. 1, 1993, operative Jan. 1, 1994; Stats. 1993, c. 611 (S.B.60), § 18, eff. Oct. 1, 1993; Stats. 1993, c. 611 (S.B.60), § 18.5, eff. Oct. 1, 1993, operative Jan. 1, 1994.)

8

No. 97-6146

FILED

MAR 27 1998

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1997

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ANGEL JAIME MONGE, *Petitioner*,

v.

STATE of CALIFORNIA, *Respondent*.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF ON THE MERITS

DANIEL E. LUNGREN  
Attorney General of California  
GEORGE WILLIAMSON  
Chief Assistant Attorney General  
CAROL WENDELIN POLLACK  
Senior Assistant Attorney General  
SUSAN D. MARTYNEC  
Supervising Deputy Attorney General  
DAVID F. GLASSMAN  
Deputy Attorney General  
\*CARL N. HENRY  
Deputy Attorney General  
\*Counsel of Record  
300 South Spring St.  
Los Angeles, CA 90013  
Telephone: (213) 897-2273  
Counsel for Respondent

BEST AVAILABLE COPY

3311



QUESTION PRESENTED

"Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?" JA<sup>1</sup> 132.

---

1. All "JA" notations are to the Joint Appendix.

TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW	1
CONSTITUTIONS, STATUTES OR REGULATIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
I. THE DOUBLE JEOPARDY CLAUSE SHOULD NOT BE ENLARGED TO APPLY TO SUCCESSIVE NONCAPITAL SENTENCING PROCEEDINGS	4
II. NONCAPITAL SENTENCING IN CALIFORNIA DOES NOT HAVE THE <i>BULLINGTON</i> HALLMARKS	13
III. IF APPLICATION OF <i>BULLINGTON</i> 'S HALLMARKS TEST COMPELS THE CONCLUSION THAT DOUBLE JEOPARDY EXTENDS TO NONCAPITAL SENTENCING PROCEEDINGS, <i>BULLINGTON</i> SHOULD BE RECONSIDERED	20
CONCLUSION	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Almendarez-Torres v. United States</i> , ___ U.S. ___ [1998 W.L. 126904] (March 24, 1998)	8
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	6
<i>Barefoot v. Estelle</i> , 463 U.S. 880, 913 (1983)	6
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	5
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	5-14, 16, 18, 19, 22, 23
<i>Carpenter v. Chapleau</i> , 72 F.3d 1259 (6th Cir. 1996)	7
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994)	5, 6, 9, 11
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17, 23 (1973)	8, 14, 21
<i>Denton v. Duckworth</i> , 873 F.2d 144 (7th Cir. 1989)	7
<i>Durham v. State</i> , 464 N.E.2d 321 (Ind. 1984)	7, 10



TABLE OF AUTHORITIES, CONT'D

<i>Graham v. Collins</i> , 506 U.S. 461 (1993)	5
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	6
<i>Johnson v. Texas</i> , 509 U.S. 350 (1993)	20
<i>Linam v. Griffin</i> , 685 F.2d 369 (10th Cir. 1982)	7
<i>Lockhart v. Nelson</i> , 488 U.S. 33 (1988)	5
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986)	8
<i>Nichols v. United States</i> , 511 U.S. 738 (1994)	8
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969)	8, 14, 21, 22
<i>Parke v. Raley</i> , 506 U.S. 20 (1992)	5, 6, 8
<i>People v. Guerrero</i> , 44 Cal.3d 343, 748 P.2d 1150 (1988)	19

TABLE OF AUTHORITIES, CONT'D

<i>People v. Hendrix</i> , 16 Cal.4th 508, 66 Cal.Rptr.2d 431, 941 P.2d 64 (1997)	17
<i>People v. Latimer</i> , 5 Cal.4th 1203, 858 P.2d 611 (1993)	17
<i>People v. Levin</i> , 623 N.E.2d 317 (Ill. 1993)	7, 13
<i>People v. Monge</i> , 16 Cal.4th 826, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997)	10-13, 19, 23
<i>People v. Olin</i> , 13 Cal.3d 937, 533 P.2d 193 (1975)	15
<i>People v. Sailor</i> , 65 N.Y.2d 224 (N.Y. 1985)	8
<i>People v. Superior Court (Romero)</i> , 13 Cal.4th 497, 917 P.2d 628 (1996)	15, 16, 18
<i>People v. Tenorio</i> , 3 Cal.3d 89, 473 P.2d 993 (1970)	15

TABLE OF AUTHORITIES, CONT'D

<i>People v. Williams</i> , 17 Cal.4th 148, 948 P.2d 429 (1998)	16, 18
<i>Perkins v. State</i> , 542 N.E.2d 549 (Ind. 1989)	8
<i>Poland v. Arizona</i> , 476 U.S. 147 (1986)	9
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980)	12
<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293 (1993)	23
<i>Schiro v. Farley</i> , 510 U.S. 222 (1994)	9
<i>State v. Aragon</i> , 116 N.M. 267 (N.M. 1993)	7
<i>State v. Cobb</i> , 875 S.W.2d 533 (Mo. 1994)	7, 13
<i>Stroud v. United States</i> , 251 U.S. 15 (1919)	21
<i>U.S. v. Rodriguez-Gonzalez</i> , 899 F.2d 177 (2d Cir. 1990)	7
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980)	5, 11, 14, 16, 19, 20, 22

TABLE OF AUTHORITIES, CONT'D

<i>United States v. Watts</i> , 117 S.Ct. 633 (1997)	8
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	12, 17
<i>Wilmer v. Johnson</i> , 30 F.3d 451 (3d Cir. 1994)	7
<i>Witte v. United States</i> , 515 U.S. 389, 115 S.Ct. 2199 (1995)	20
<u>Constitutional Provisions</u>	
U.S. Const. amend. V	20, 21
<u>Statutes</u>	
18 U.S.C. § 3576	20
Cal. Health & Safety Code § 11359	17
Cal. Health & Safety Code § 11360	17



TABLE OF AUTHORITIES, CONT'D

Cal. Health & Safety Code § 11361	17
Cal. Penal Code § 18	17
Cal. Penal Code § 654	17
Cal. Penal Code § 667	12, 16, 18, 19
Cal. Penal Code § 667.5	18
Cal. Penal Code § 1025	10, 22
Cal. Penal Code § 1170.1	18
Cal. Penal Code § 1170.12	16, 18, 19
Cal. Penal Code § 1192.7	15
Cal. Penal Code § 1238	18
Cal. Penal Code § 1385	15-18

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

No. 97-6146

---

ANGEL JAIME MONGE, *Petitioner*,

v.

STATE of CALIFORNIA, *Respondent*.

---

OPINION BELOW

In an opinion filed August 27, 1997, the Supreme Court of California reversed the judgment of the Court of Appeal of California. The intermediate appellate court had held Respondent could not relitigate the truthfulness of a prior felony conviction allegation. The Supreme Court of California held the federal prohibition against double jeopardy does not apply to a noncapital sentencing proceeding in California. *People v. Monge*, 16 Cal.4th 826, 831-45, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997); JA 40, 46-47, 49.

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

### STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, Petitioner was charged with three offenses: adult using a minor to sell marijuana in violation of California Health and Safety Code section 11361(a) (count I), sale or transportation of marijuana in violation of California Health and Safety Code section 11360(a) (count II), and possession of marijuana for sale in violation of California Health and Safety Code section 11359 (count III). As to all counts, it was alleged Petitioner had a prior serious or violent felony conviction within the meaning of California's "Three Strikes Law" set forth in California Penal Code sections 667(b)-(i) (legislative version) and 1170.12(a)-(e) (initiative version), and had served a prior prison term within the meaning of California Penal Code section 667.5(b). Petitioner pled not guilty and denied all special allegations.

A jury found Petitioner guilty as charged on the substantive offenses. After a bifurcated proceeding on the prior conviction allegations, the court found the allegations true (JA 9-16, 18) and sentenced Petitioner to a total term of imprisonment of 11 years: 5 years on count I, doubled to 10 years under the Three Strikes Law, plus 1 year for the prior prison term enhancement. JA 50-52.

The California Court of Appeal affirmed the conviction, but reversed on insufficiency grounds the true finding on the "strike" allegation. The California Court of Appeal also held the Double Jeopardy Clause precluded the prosecution from relitigating the strike allegation. The Court of Appeal remanded for resentencing. JA 41-45, 52-53.

The California Supreme Court reversed, holding the People could relitigate the strike allegation because

the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. JA 49, 53, 74-75, 78.<sup>2</sup>

---

2. On January 7, 1998, the strike allegation was relitigated. At this hearing the court admitted into evidence the preliminary hearing transcript from Petitioner's prior case. The transcript showed Petitioner had personally inflicted great bodily injury and had used a dangerous or a deadly weapon during his commission of assault in 1992. The court again found the strike allegation true.



### SUMMARY OF ARGUMENT

The Fifth Amendment of the United States Constitution provides that "(n)o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb ...." Petitioner claims this constitutional guaranty, known as the Double Jeopardy Clause, applies to noncapital sentencing proceedings. In *Bullington v. Missouri*, 451 U.S. 430 (1981), a 5-to-4 decision, the Court held the Clause applies to a capital penalty phase which has the hallmarks of a trial on guilt or innocence. Petitioner asks the Court to extend *Bullington* to noncapital sentencing proceedings. The request should be denied, for several reasons, and the judgment of the Supreme Court of California should be affirmed. First, the Double Jeopardy Clause should not be enlarged to apply to successive noncapital sentencing proceedings. In any event, noncapital sentencing in California does not have the hallmarks of *Bullington*. If application of *Bullington*'s hallmarks test compels the conclusion that double jeopardy extends to noncapital sentencing proceedings, the Court should reconsider *Bullington*. For these reasons, the Court should affirm the decision of the Supreme Court of California.

#### IV.

#### THE DOUBLE JEOPARDY CLAUSE SHOULD NOT BE ENLARGED TO APPLY TO SUCCESSIVE NONCAPITAL SENTENCING PROCEEDINGS

This Court has never held, and should not now hold, that the Double Jeopardy Clause applies to noncapital sentencing proceedings. On the contrary, the Court has previously declined to extend the Double Jeopardy Clause to noncapital sentencing proceedings in

*United States v. DiFrancesco*, 449 U.S. 117 (1980), and it reserved the issue in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988), before confirming that expansion of the Double Jeopardy Clause to noncapital cases would constitute a "new rule." *Caspari v. Bohlen*, 510 U.S. 383 (1994). *Caspari* makes clear that a new rule extending *Bullington*, 451 U.S. 430, to noncapital sentencing proceedings is not dictated by precedent, would break new ground, and would impose a new burden on the states and the federal government. *Caspari*, 510 U.S. at 390.<sup>3</sup>

Recidivist laws such as California's Three Strike Law, which punish habitual offenders more severely than first offenders, "have a long tradition in this country that dates back to colonial times." *Parke v. Raley*, 506 U.S. 20, 27 (1992).<sup>4</sup> Such laws are now in effect "in all 50 States," and the federal government has enacted such laws. *Id.* at 26-27. "States have a valid interest in deterring and segregating habitual criminals." *Id.* at 27.

Significantly, the Court has repeatedly upheld recidivism statutes challenged under the Double Jeopardy Clause. *Raley*, 506 U.S. at 27. The Court has rejected due process challenges to "a variety of state procedures for implementing otherwise valid recidivism statutes." *Id.* "Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given the high rate of recidivism and the diversity of approaches that States have developed for addressing it." *Id.* at 28. The Court has also said "a charge under a recidivism statute

---

3. In *Graham v. Collins*, 506 U.S. 461 (1993), the Court said a rule is "new" if it breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent. *Graham*, 506 U.S. at 467.

4. *Raley* held due process permits a state to impose a burden of production on a recidivist defendant who attacks the validity of a prior conviction under *Boykin v. Alabama*, 395 U.S. 238 (1969). *Raley*, 506 U.S. at 34.

does not state a separate offense, but goes to punishment only." *Id.* at 27. Having upheld recidivist laws under double jeopardy attack, *Raley*, 506 U.S. at 27, having rejected due process attacks on "a variety of state procedures" for implementing recidivism laws, *id.* at 27, and having held a recidivist charge "does not state a separate offense[.]" *id.*, the Court should not now hold that a proceeding to prove a prior conviction (necessary to trigger an alternate sentencing scheme) is the equivalent of a proceeding to prove an offense such that a lack of proof bars a successive attempt to prove the prior conviction. Instead, the type of proceeding at issue here is akin to a proceeding to prove a prior conviction for purposes of sentence enhancement.

*Caspari* also specifically confirms that the reasoning of *Bullington* and *Arizona v. Rumsey*, 467 U.S. 203 (1984), "was based largely on the unique circumstances of a capital sentencing proceeding." 510 U.S. at 392. In *Bullington*, a bare majority held that Missouri's capital sentencing proceedings, which it characterized as "unique," 451 U.S. at 441 n.15, so resemble a criminal trial that they are subject to the Double Jeopardy Clause. The procedural differences in capital sentencing proceedings constituted the "underlying rationale" of extending the Double Jeopardy Clause to capital sentencing proceedings. 451 U.S. at 441; see also *Gregg v. Georgia*, 428 U.S. 153, 191 (1976). Insofar as *Bullington's* holding can be attributed to the "death is different" rationale, obviously that rationale has no application in a noncapital sentencing proceeding. *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, e.g., *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981)"). *Bullington* thus only created a narrow exception in death penalty cases regarding application of the Double

Jeopardy Clause. That exception should not be enlarged so as to swallow the rule.<sup>2</sup>

---

5. States and federal courts are divided as to whether the Double Jeopardy Clause applies to noncapital sentencing proceedings analogous to the one here. Respondent's position is shared by a variety of courts that have found the federal double jeopardy clause did not apply in analogous proceedings. (See, e.g., *Carpenter v. Chappleau*, 72 F.3d 1259, 1274 (6th Cir. 1996) ("We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."); *Denton v. Duckworth*, 873 F.2d 144, 148 (7th Cir. 1989) ("We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."); *Linam v. Griffin*, 685 F.2d 369, 376 (10th Cir. 1982) (The habitual criminal proceeding "is an inquiry as to whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."); *Durham v. State*, 464 N.E.2d 321, 324 (Ind. 1984) ("The habitual offender status . . . is a continuing status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."); *State v. Cobb*, 875 S.W.2d 533, 536 (Mo. 1994) ("The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."); *State v. Aragon*, 116 N.M. 267, 271 [861 P.2d 948, 952] (N.M. 1993) ("Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."); cf. *Wilmer v. Johnson*, 30 F.3d 451, 456 (3d Cir. 1994) ("[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."); *U.S. v. Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir. 1990) ("Reliance on . . . *Bullington* is inapposite . . . since . . . [*Bullington*] arose in the unique context of capital sentencing."); *People v. Levin*, 623 N.E.2d 317, 325 (Ill. 1993) ("We conclude that the separate hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."); *People*



First, however, Respondent will demonstrate that the Double Jeopardy Clause has no application in this case at all, because proof of a prior conviction -- like an enhancement -- is not an "offense" as the latter term is defined in the Double Jeopardy Clause.

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 23 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Clause was designed to protect an innocent defendant from the anxiety and insecurity of having to face repeated attempts by a prosecutor to obtain a conviction. This case, however, does not involve an offense because "a charge under a recidivism statute does not state a separate offense[.]" *Raley*, 506 U.S. at 27; see also *Almendarez-Torres v. United States*, \_\_\_ U.S. \_\_\_ [1998 W.L. 126904] (March 24, 1998).

It is similarly settled that an enhancement is not an offense. See *United States v. Watts*, 117 S.Ct. 633, 636 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction"); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994) (sentencer may consider "a defendant's past criminal behavior, even if no conviction resulted from that behavior"), noting *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (states may treat "visible possession of a firearm" as a sentencing

---

*v. Sailor*, 65 N.Y.2d 224, 231-36 [480 N.E.2d 701, 708] (N.Y. 1985) ("[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender. . . ."); but see *Perkins v. State*, 542 N.E.2d 549, 551-52 (Ind. 1989) (overruling *Durham v. State*, *supra*, 464 N.E.2d 321).

consideration rather than an element of a particular offense); *Schiro v. Farley*, 510 U.S. 222, 230-31 (1994) ("[W]e have also upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried."). Therefore, *Bullington* did not address whether the penalty hearing constitutes the trial of an offense.

Similarly, a lack of proof of prior offender status is not an "acquittal" of such status. For that reason, the defendant in *Caspari* could not successfully argue that the State's failure to prove his recidivist status at his first sentencing hearing operated as an acquittal of that status. 510 U.S. at 391. *Caspari* reiterated that a sentence does not have the qualities of constitutional finality that attend an acquittal. *Id.* This Court should reject the claim that a failure of proof in this context represents an acquittal, just as the Court has rejected the contention that a lack of proof regarding an aggravating circumstance in a capital case necessarily constitutes an acquittal of that circumstance for double jeopardy purposes. *Poland v. Arizona*, 476 U.S. 147, 155-56 (1986).

Nor does this case, or noncapital sentencing proceedings generally, involve the interests applicable to the innocent defendant. Whatever one thinks of the justifications that have been offered to extend double jeopardy protection to capital sentencing proceedings, they plainly do not warrant extending those protections to ordinary noncapital sentencing proceedings. A prior offender has the status of being a prior offender and that status is unaffected by a statute requiring the government to prove the status. The prior convictions either do or do not exist, and the defendant's status is unaffected by the government's ability to prove that status.

In a trial of a prior conviction allegation, the trial determines only a question of the defendant's continuing

status, irrespective of the current offense, and in California the prosecution may reallege and retry that status in as many successive cases as it is relevant, even if a prior jury has rejected the allegation, because the jury's rejection of the allegation does not acquit the defendant of his prior conviction status. *People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1130, JA 65. "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." *Durham v. State*, 464 N.E.2d at 324.

The California Supreme Court, writing in Petitioner's case, found that a sentencing proceeding under California Penal Code section 1025 is unlike the sentencing proceeding in *Bullington* and did not implicate the interests protected by the Double Jeopardy Clause. Consequently, the Court concluded *Bullington's* "hallmarks" analysis did not apply.

First, the California Supreme Court contrasted the trial-like procedures that regulate imposition of the death penalty with a noncapital sentencing hearing. A prior conviction trial in California does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances regarding the defendant's character, nor does it then require a finding that aggravation outweighs mitigation, or a weighing of those circumstances. Nor does a California noncapital sentencing trial allow the trier of fact to reject a longer sentence if the sentence is supported by the evidence. "Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here." *People v. Monge*, 16 Cal.4th at 837, 941 P.2d at 1129, JA 62.

Second, a trial of a prior conviction does not represent the sentencing "ordeal" described in *Bullington* and *DiFrancesco*, 449 U.S. at 136 ("repeated attempts to

convict [subject] . . . defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent."). *Bullington* described the anxiety and insecurity faced by a capital defendant during sentencing proceedings as "equivalent to that faced by a defendant at the guilt phase of a criminal trial." 451 U.S. at 445.

An enhancement proceeding, however, is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; "rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which like age or gender, is readily determinable from the public record." *People v. Monge*, 16 Cal.4th at 838, 941 P.2d at 1129, JA 63 (emphasis in original); see *Caspari*, 510 U.S. at 396 ("Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not."); *DiFrancesco*, 449 U.S. at 136-37 (a sentence is determined "in large part on the basis of information . . . developed outside the courtroom").

When, as in Petitioner's case, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. Accordingly, the marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. While the outcome of a trial of prior conviction allegations is undoubtedly *important* to a defendant -- potentially increasing a short prison term to a life term -- the level of embarrassment, expense, and anxiety involved is not equivalent to that faced at the guilt phase of the trial. This lessened financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence. *People v. Monge*, 16 Cal.4th at 838, 941 P.2d at 1129, JA 63.



Clearly, any alleged increase in anxiety, expense and embarrassment caused by an enhancement proceeding, even one leading to a long prison term under California's Three Strike Law, Cal. Penal Code § 667(e)(2), is not comparable to the ordeal faced by one subject to a penalty of death. See *Bullington*, 451 U.S. at 448 (Powell, J., dissenting) (lack of "documentation in the record" to support the majority's claim that "the expense, ordeal, and anxiety at a resentencing in a capital murder case are as great as would accompany a redetermination of guilt or innocence"); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). And the defendant's interest in finality in circumstances short of an acquittal is clearly outweighed by the societal interest in assuring that the punishment fits the offender, which in this case is a convicted recidivist. See *Williams v. New York*, 337 U.S. 241 (1949).

The California Supreme Court also found a third distinguishing feature between capital and noncapital sentencing proceedings -- the essential nature of the jury's inquiry. The sentence determination in a death penalty case depends largely on the facts of the defendant's capital crime, overlapping with the guilt phase of the trial, and additionally includes a general appraisal of the defendant's character. A trial of a prior conviction, in contrast, is typically divorced from the defendant's current crime, and the evidence is unrelated. *People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1130, JA 65.

For these reasons, the Double Jeopardy Clause is inapplicable to noncapital sentencing proceedings.

## V.

NONCAPITAL SENTENCING IN  
CALIFORNIA DOES NOT HAVE THE  
*BULLINGTON* HALLMARKS

Even assuming the applicability of the Double Jeopardy Clause, that Clause does not prohibit readjudication of the prior conviction allegation in this case because California's sentence enhancement proceedings do not contain all the hallmarks of a trial on guilt or innocence. *Bullington* therefore should not be extended to noncapital sentencing proceedings.<sup>6</sup>

The Double Jeopardy Clause should not be extended to noncapital sentencing proceedings because noncapital sentencing proceedings provide for a broad range of punishment. *Bullington* held that the Double Jeopardy Clause is applicable only when the sentencer is without discretion to exercise its authority and cannot select from amongst a wide range of punishment. 451 U.S. at 444. In *Bullington*, this Court noted that the jury in capital punishment proceedings was "not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute." 451 U.S. at 438.

Before and after *Bullington* this Court has declined to extend the Double Jeopardy Clause to sentencing proceedings which authorize a wide range of punishment. When the sentencer has a wide range of punishment from which to choose, the Double Jeopardy Clause does not foreclose the issuance of a higher

---

6. *State v. Cobb*, 875 S.W.2d at 535 (Mo. 1994) (Supreme Court of Missouri, where *Bullington* originated, declined to extend *Bullington*); *People v. Levin*, 623 N.E.2d at 322 (Supreme Court of Illinois declined to extend *Bullington*). The Supreme Court of California, of course, refused to extend *Bullington* here. *People v. Monge*, 16 Cal.4th at 829, 941 P.2d at 1123, JA 49.

sentence upon resentencing. *North Carolina v. Pearce*, 395 U.S. at 719-21. This holding was extended to sentencing determinations by a jury in *Chaffin v. Stynchcombe*, 412 U.S. at 17. Likewise, this Court declined to extend the Double Jeopardy Clause to federal enhancement proceedings in *United States v. DiFrancesco*, 449 U.S. 117.

The Missouri law at issue in *Bullington* had only two sentencing choices for the jury in the case of a capital murderer (death or life without the possibility of probation or parole for 50 years). *Bullington*, 451 U.S. at 432. Under the Missouri death penalty law, the sentencing jury did not have "unbounded discretion," but rather chose "between two alternatives." *Id.* at 438. California, in contrast, allows a wide range of sentencing choices for a noncapital defendant. In Petitioner's case, for instance, the judge had *ten* sentencing choices (3, 4, 5, 6, 7, 8, 10, 11, 14, or 15 years) under California's statute.

Thus, unlike the jury in *Bullington*, the judge in the present case could have sentenced Petitioner to a broad range of punishment.<sup>7</sup> The judge was not limited to imposing either life imprisonment or capital punishment. Because the judge could have sentenced Petitioner to a term within a range of punishment, the reasoning of *Bullington* is inapplicable to noncapital proceedings to prove prior convictions. The lack of sentencing discretion, a rationale for the Court's application of the Double Jeopardy Clause to capital sentencing proceedings, is not present in this noncapital case.

---

7. Petitioner confuses the issue by merging the fact-finder's limited role in noncapital sentencing with the discretion potentially exercised by a judge, subsequent to the factual determination, when the judge is selecting a sentence. PBM 12-13. See Argument II, *post*. A noncapital sentencing fact-finder decides only whether the proof is sufficient. If so, that does not end the inquiry, as the sentence has yet to be imposed.

California's Three Strike Law describes a "strike," in part, as any offense defined in California Penal Code section 1192.7(c).<sup>8</sup> A trial court in California has discretion under California Penal Code section 1385(a) to disregard, on the court's own motion, any prior conviction allegations at any time during the proceedings "in furtherance of justice," and the exercise of that discretion is reviewable only for abuse. *People v. Superior Court (Romero)*, 13 Cal.4th 497, 504, 529-31, 917 P.2d 628, 647-49 (1996). "We have held that the power to dismiss an action [under § 1385] includes the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions." *Romero*, 13 Cal.4th at 504, 917 P.2d at 630; see also *People v. Olin*, 13 Cal.3d 937, 946, 533 P.2d 193 (1975) ("It is also settled that it is within the trial court's power under [§ 1385] to strike or dismiss a proceeding as to a prior conviction for the purpose of sentencing"), citing *People v. Tenorio*, 3 Cal.3d 89, 94, 473 P.2d 993 (1970). The Three Strike Law under which Petitioner was sentenced also provides that:

[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to

---

8. California Penal Code section 1192.7(c)(8) says a serious felony is "any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice[.]" and California Penal Code section 1192.7(c)(23) says a serious felony is "any felony in which the defendant personally used a dangerous or deadly weapon[.]" Hence, if the State could prove Petitioner personally inflicted great bodily injury and/or used a dangerous or deadly weapon when convicted of assault in 1992 (JA 5), his assault conviction would be a strike. JA 27-28, 33-34.



prove the prior felony conviction, the court may dismiss or strike the allegation.

Cal. Penal Code §§ 667(f)(2), 1170.12(d)(2).<sup>9</sup> Thus, unlike the adjudicator of guilt or innocence, the California sentencing court has more than two choices when imposing sentence, a fact which the Court deemed of great importance to its decisions in both *Bullington* and *DiFrancesco*. See *Bullington*, 451 U.S. at 438, 440.

Moreover, California law requires that, in determining whether to dismiss or strike an allegation under section 1385, the sentencing court must "consider both the constitutional rights of the defendant, and the interests of society represented by the prosecution." *People v. Superior Court (Romero)*, 13 Cal.4th at 530, 917 P.2d at 648.

In the specific context of the Three Strike Law, the California Supreme Court has also stated that a court deciding whether to strike or dismiss a prior felony conviction

must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies.

*People v. Williams*, 17 Cal.4th 148, 161, 948 P.2d 429, 437 (1998).

---

9. The California Supreme Court has interpreted these provisions to permit the sentencing court to strike or dismiss a prior conviction either on the court's own motion or on that of the prosecutor. *People v. Superior Court (Romero)*, 13 Cal.4th at 504, 917 P.2d at 630.

Significantly, the considerations which inform the discretionary striking or dismissal of a prior conviction under section 1385 substantially mirror the "life, health, habits, conduct, and mental or moral propensities" said by this Court to be proper sentencing considerations in *Williams v. New York*, 337 U.S. at 245. The sentencing court's freedom to consider such factors again suggests that the sentencing proceedings at issue here are more like a traditional sentencing and less like a trial on guilt or innocence.

Here, of the three crimes the jury found Petitioner guilty of committing, the court selected count I, adult using a minor to sell or transport marijuana, as the base count. JA 7. The punishment range for that crime is 3, 5, or 7 years. Cal. Health & Safety Code § 11361(a).<sup>10</sup>

Under California's State Three Strike Law, following a true finding on a strike allegation in a second-strike case (i.e., a case where the defendant has a current conviction for any felony and one prior conviction for any serious or violent felony), the court must double the term

---

10. The court was required to use count I as the base count due to California Penal Code section 654, see JA 20, 22, which provides, "An act or omission that is punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Cal. Penal Code § 654(a); see *People v. Latimer*, 5 Cal.4th 1203, 1207-12, 858 P.2d 611 (1993); see, e.g., *People v. Hendrix*, 16 Cal.4th 508, 511-15, 66 Cal.Rptr.2d 431, 941 P.2d 64 (1997). The sentencing range for count II (sale or transportation of marijuana) is 2, 3 or 4 years. Cal. Health & Safety Code § 11360(a). The range for count III (possession of marijuana for sale) is "imprisonment in the state prison[.]" (Cal. Health & Safety Code § 11359) which means it is 16 months, 2 or 3 years. Cal. Penal Code § 18. Since the longest potential term is count I, that count had to be the base count in this case.

selected for the current base count. Cal. Penal Code §§ 667(e)(1) (legislative version), 1170.12(c)(1) (initiative version); see *Romero*, 13 Cal.4th at 504-06, 917 P.2d at 630-31 (discusses enactment of both versions). As noted, however, the court is later free to dismiss the strike in furtherance of justice under *Romero*. Hence, if the instant sentencer chose to use the strike to double count I, the choice of sentence would be 6 years (a 3-year low term doubled), 10 years (a 5-year middle term double), or 14 years (a 7-year upper term doubled). Since Petitioner had served a prior prison term, California Penal Code section 667.5(b) required that a 1-year enhancement be imposed. JA 19-20, 40, 50, 52. The sentencing court, however, retained discretion to dismiss the 1-year enhancement. See Cal. Penal Code §§ 1170.1(d), 1385(a).

Here, the court imposed a 5-year middle term for count I, doubled to 10 years under the Three Strike Law, and added a 1-year prior prison term enhancement. JA 19-20. Had the court chosen to *dismiss* the strike and prior prison term allegations, the choice of sentence was 3, 5 and 7 years. Had a *low* term been imposed with a dismissal of the strike and prior prison term allegations, Petitioner could have received a *total* term of 3 years.

The above shows the sentencer here had *ten* sentencing choices (3, 4, 5, 6, 7, 8, 10, 11, 14 or 15 years). Hence, California's noncapital sentencing process does not share *Bullington's* two-choice hallmark.

Second, California's sentencing scheme permits the government to appeal from a sentencing court's determination that it will not consider a prior conviction in imposing sentence. See Cal. Penal Code § 1238(a)(10). See also *People v. Williams*, 17 Cal.4th at 157-159, 948 P.2d at 429. Because the Petitioner "is charged with knowledge of the statute and its appeal provisions, [he] has no expectation of finality in his sentence until the appeal is concluded." *DiFrancesco*, 449 U.S. at 136. Where one reason for declining to consider a prior conviction in

sentencing is the court's determination that "there is insufficient evidence to prove the prior felony conviction," Cal. Penal Code §§ 667(f)(2), 1170.12(d)(2), and the government is permitted to appeal from the determination, the defendant is on notice of the fact that a finding of insufficient evidence will not necessarily end the possibility he may be subjected to a recidivist sentencing scheme. See *DiFrancesco*, 449 U.S. at 137.

Third, California's Three Strike Law requires the government to "plead and prove *each* prior felony conviction except as provided in paragraph (2)."<sup>11</sup> Cal. Penal Code §§ 667(f)(1), 1170.12(d)(1) (emphasis added). By essentially removing the prosecutor's discretion to choose the prior convictions to be used to enhance a defendant's sentence, the statute renders the sentence enhancement proceeding less like a trial, and more like an administrative review of a defendant's prior criminal record.

Fourth, under California law, if the state chooses to present the sentencing court with evidence of a prior conviction other than a certified copy of the conviction, the state is only permitted to present evidence from the record of the prior conviction. See *People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1129, citing *People v. Guerrero*, 44 Cal.3d 343, 355, 748 P.2d 1150, 1157 (1988). Thus, there is no risk that the sentence enhancement proceeding will become a second trial, at which the government marshals new evidence of which a defendant is unaware, and presents it for the first time. See *Bullington*, 451 U.S. at 440 (distinguishing the federal procedures at issue in *DiFrancesco* because "appellate review of a sentence

<sup>11</sup> "Paragraph (2)" refers to sections 667(f)(2) and 1170.12(d)(2), set forth above, which permit the prosecutor to move to strike or dismiss certain prior convictions in furtherance of justice or if supported by insufficient evidence.



[proceeded] 'on the record of the sentencing court,'" quoting 18 U.S.C. § 3576).

For all of these reasons, California's sentencing proceeding more closely resembles a traditional sentencing proceeding than it does a trial on guilt or innocence. Thus, even if the Court were to hold that the Double Jeopardy Clause applies to noncapital sentencing proceedings which have the hallmarks of a trial on guilt or innocence, double jeopardy would not bar a second proceeding to determine whether the prior conviction is true.

## VI.

### IF APPLICATION OF *BULLINGTON'S* HALLMARKS TEST COMPELS THE CONCLUSION THAT DOUBLE JEOPARDY EXTENDS TO NONCAPITAL SENTENCING PROCEEDINGS, *BULLINGTON* SHOULD BE RECONSIDERED

If Petitioner is correct, and the hallmarks present here are the equivalent of those identified in *Bullington* such that *Bullington* controls even this noncapital case, that only further illustrates that *Bullington's* extension of double jeopardy protection should be reconsidered and overruled because it is irreconcilable with the plain language of the Fifth Amendment and all previous precedents of this Court.<sup>12/</sup>

12. The Court has said *stare decisis* has force unless there is a demonstration that an earlier case misinterpreted a constitutional command. *Johnson v. Texas*, 509 U.S. 350, 366-67 (1993); see *Witte v. United States*, 515 U.S. 389, 406, 115 S.Ct. 2199, 2209 (1995) (Scalia, J., concurring in judgment, joined by Thomas, J.) (double jeopardy "is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect").

As already noted, the Double Jeopardy Clause by its terms proscribes a second jeopardy "for the same offence." U.S. Const. amend. V, *italics added*. The Clause makes no express reference to sentencing determinations, and, traditionally, this Court has been reluctant to apply the Clause to sentencing determinations.

In *Stroud v. United States*, 251 U.S. 15 (1919), a jury found the defendant guilty of first degree murder "without capital punishment," which was one of its options under the applicable statute. *Id.* at 17, 18. This Court reversed the judgment. A jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. *Id.* at 17. The Court - held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the Court did not consider the verdict of "guilty . . . 'without capital punishment'" as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." *Id.* at 18.

*Stroud* was reaffirmed in *Pearce*, *supra*, 395 U.S. at 720. In *Pearce*, the Court ruled that the Double Jeopardy Clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.* at 719.

In *Chaffin v. Stynchcombe*, 412 U.S. at 23-24, the Court again reaffirmed that the Double Jeopardy Clause does not preclude a longer sentence following retrial. Finally, in *United States v. DiFrancesco*, 449 U.S. 117, decided only five months before the Court determined *Bullington*, the Court held that the sentencing scheme at issue did not violate the Double Jeopardy Clause, noting

that "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." *Id.* at 133. Thus, in a variety of contexts, the Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings.

*Bullington* represented a complete departure from this approach. Until *Bullington*, this Court had never applied the Double Jeopardy Clause to sentencing decisions after retrial. Although the *Bullington* court may have been inclined to do so because "death is different," that rationale is grounded in the Eighth Amendment principles concerning cruel and unusual punishments, not the Double Jeopardy Clause. This Court's holding in *Bullington* applying the Double Jeopardy Clause to sentencing proceedings is inconsistent with the holdings in *North Carolina v. Pearce*, *supra*, and *United States v. DiFrancesco*, *supra*. Although the Court distinguished these cases because of the "unique" procedures employed during Missouri capital sentencing proceedings, the analytical "difference is immaterial for the purpose of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 n.2 (Powell, J., dissenting).

Application of the Double Jeopardy Clause should not depend on the procedural particulars established by each state. An expansion of *Bullington* to include noncapital sentencing proceedings would only prompt states to reconsider the discretionary procedural benefits they now grant to defendants in a noncapital sentencing trial. As the California Supreme Court pointed out in this case, many of the procedural protections that apply in a section 1025 hearing rest on statutory, not federal grounds. And section 1025's grant of a jury trial has been extended to include various elective procedural guaranties. For example, the defendant's state law right to proof beyond a reasonable doubt and the privilege against self-incrimination have arisen out of judicial dictum. *People v. Monge*, 16 Cal.4th at 834, 941 P.2d at

1126, JA 56. By amending these procedures, states would avoid any comparison with *Bullington*, and thereby reduce the procedural rights currently enjoyed by a recidivist defendant. See e.g., *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301 (1993) ("We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest").

Accordingly, *Bullington's* extension of the Double Jeopardy Clause should be reconsidered.



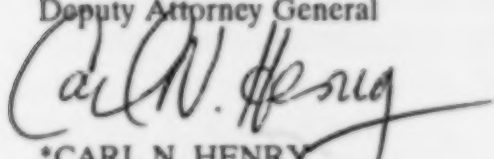
CONCLUSION

For all of the foregoing reasons, Respondent respectfully asks that the Court affirm the decision of the Supreme Court of California.

Dated: March 25, 1998.

Respectfully submitted,

DANIEL E. LUNGREN  
Attorney General of California  
GEORGE WILLIAMSON  
Chief Assistant Attorney General  
CAROL WENDELIN POLLACK  
Senior Assistant Attorney General  
SUSAN D. MARTYNEC  
Supervising Deputy Attorney General  
DAVID F. GLASSMAN  
Deputy Attorney General



\*CARL N. HENRY  
Deputy Attorney General  
\*Counsel of Record

Counsel for Respondent

APR 10 1998

CLERK

(9)  
No. 97-6146

In The  
**Supreme Court of the United States**  
October Term, 1997

— ♦ —  
ANGEL J. MONGE,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

— ♦ —  
**On Writ Of Certiorari  
To The Supreme Court Of The  
State Of California**  
— ♦ —

**REPLY BRIEF FOR PETITIONER**  
— ♦ —

CLIFF GARDNER\*  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109  
(415) 922-9404

*Counsel for Petitioner*

*\* Counsel of Record*

24 PP



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I. NEITHER PRECEDENT NOR POLICY WARRANT REFUSING TO APPLY DOUBLE JEOPARDY TO FULLY ADVERSARIAL NON-CAPITAL SEN- TENCE ENHANCEMENT TRIALS.....	2
A. The Vast Majority Of Non-Capital Sentence Enhancement Trials Involve Neither Prior Con- viction Allegations Nor An Inquiry Into The Defendant's Status As A Prior Offender.....	3
B. Where A State Chooses To Provide Certain Pro- cedures Which Are Not Themselves Required By The Constitution, Those Procedures Must Comply With The Constitution .....	9
C. <i>Bullington</i> Did Not Depend On The Capital Nature Of The Proceeding At Issue.....	12
II. THE CALIFORNIA SENTENCE ENHANCE- MENT SCHEME CONTAINS ALL THE HALL- MARKS OF A TRIAL ON GUILT OR INNOCENCE .....	15
CONCLUSION .....	19

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Bullington v. Missouri</i> , 451 U.S. 446 (1981) .....	<i>passim</i>
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970) .....	10
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968) .....	10
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) .....	9, 10
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975) .....	10
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956) .....	10
<i>Irvin v. Dodd</i> , 366 U.S. 717 (1961) .....	9, 11
<i>McKane v. Durston</i> , 153 U.S. 684 (1894) .....	10
<i>Moragne v. United States</i> , 369 U.S. 952 (1969) .....	19
<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992) .....	9, 10
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975) .....	10
<i>Patterson v. New York</i> , 432 U.S. 197 (1977) .....	10
<i>Payne v. Tennessee</i> , 498 U.S. 1076 (1991) .....	19
<i>People v. Best</i> , 56 Cal.App.4th 41 (1997) .....	6
<i>People v. Brookins</i> , 215 Cal.App.3d 1297 (1989) .....	6
<i>People v. Calderon</i> , 9 Cal.4th 69 (1994) .....	8
<i>People v. Cina</i> , 41 Cal.App.3d 136 (1974) .....	16
<i>People v. Equarte</i> , 42 Cal.3d 456 (1986) .....	7
<i>People v. Jackson</i> , 7 Cal.App.4th 1367 (1992) .....	6
<i>People v. Maldonado</i> , 186 Cal.App.3d 863 (1986) .....	6
<i>People v. Marquez</i> , 16 Cal.App.4th 115 (1993) .....	6
<i>People v. Monge</i> , 16 Cal.4th 826 (1997) .....	7, 8, 15

## TABLE OF AUTHORITIES - Continued

	Page
<i>People v. Rodriguez</i> , 17 Cal.4th 253 (1998) .....	6
<i>People v. Superior Court (Howard)</i> , 69 Cal.2d 491 (1968) .....	16
<i>People v. Superior Court (Romero)</i> , 13 Cal.4th 497 (1996) .....	16
<i>People v. Thomas</i> , 4 Cal.4th 206 (1993) .....	16
<i>People v. Williams</i> , 50 Cal.App.4th 1405 (1996) .....	6
<i>People v. Williams</i> , 222 Cal.App.3d 911 (1990) .....	6
<i>Smith v. Bennett</i> , 365 U.S. 708 (1961) .....	10
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984) .....	10, 14
<i>Specht v. Patterson</i> , 386 U.S. 605 (1967) .....	14
<i>Stringer v. Black</i> , 503 U.S. 222 (1992) .....	15
<i>Stroud v. United States</i> , 251 U.S. 15 (1919) .....	12, 13
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980) .....	13
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990) .....	14
UNITED STATES CODE	
21 U.S.C. § 924(c) .....	4
CALIFORNIA PENAL CODE	
§ 261.5(a) .....	9
§ 271 .....	9
§ 288a(b)(2) .....	9
§ 290 .....	9



## TABLE OF AUTHORITIES – Continued

	Page
§ 667(a) .....	6, 16
§ 667(a)(4) .....	5
§ 667(d)(1) .....	5
§ 667.7 .....	6
§ 667.8 .....	4
§ 1238(a)(10) .....	18
§ 12022.7 .....	4
§ 12022.53(b) .....	4
§ 12022.53(c) .....	4
§ 12022.53(h) .....	16
§ 1385 .....	16
§ 1385(b) .....	16
CALIFORNIA HEALTH & SAFETY CODE	
§ 11370.2 .....	6
UNITED STATES CONSTITUTION	
Fifth Amendment .....	10
Sixth Amendment .....	10, 14
Eighth Amendment .....	14
Fourteenth Amendment .....	10, 14
OTHER AUTHORITIES	
Stern & Gressman, Supreme Court Practice (7th Ed. 1993) .....	19

## INTRODUCTION

Had the jury and appellate courts in this case found sufficient evidence to prove the charged allegation, that finding would certainly bind defendant and preclude him from requesting a second chance to litigate the charge. The question here is whether a finding of insufficient evidence will similarly bind the state.

In this context, the Court has never before permitted the state repeated chances to prove a criminal allegation beyond a reasonable doubt when it has once failed to do so. The Court has never before permitted the state to ignore a jury's finding that the state has not proved its case. The Court has never before permitted the state to ignore a similar finding made by an appellate court.

Here, respondent and its amici ask the Court to do all three. Although they take slightly different approaches, their joint request for repeated chances to empanel a factfinder and prove sentence enhancement allegations is premised on two general points.

First, they argue that the "hallmarks of trial" test of *Bullington v. Missouri*, 451 U.S. 430 (1981) must be confined to capital cases. Respondent's Brief ("RB") at 4-13; Amicus Brief of Solicitor General ("SG") at 12-20; Amicus Brief of National Association of Attorneys General ("AG") at 15-27. Second, even if the hallmarks test did apply, California sentence enhancement trials do not have sufficient hallmarks to merit application of Double Jeopardy. RB at 13-19; SG at 21-22.

To its credit, respondent bluntly frames the rule it seeks. Respondent argues that Double Jeopardy permits

the state multiple opportunities to prove a sentence enhancement allegation even where a "jury has rejected the allegation." RB at 10. In other words, a jury's finding in favor of a defendant is constitutionally irrelevant, only jury findings in favor of the state count. As discussed below, neither of respondent's arguments supports adoption of this one-sided rule.

---

### ARGUMENT

#### I. NEITHER PRECEDENT NOR POLICY WARRANT REFUSING TO APPLY DOUBLE JEOPARDY TO FULLY ADVERSARIAL NON-CAPITAL SENTENCE ENHANCEMENT TRIALS.

Respondent and two of its amici argue that the "hallmarks of trial" test of *Bullington v. Missouri*, 451 U.S. 430 applies only to capital cases. RB at 4-13; SG at 12-20; AG at 15-27. Three general reasons are put forth for this limitation.

First, they describe the inquiry made at such trials as one involving "status" only – whether defendant has a criminal record – and argue that determinations of status do not implicate Double Jeopardy concerns. RB at 9-10; SG at 18-19; AG at 10, 13-14. Second, they argue it would be unsound policy to hinge application of Double Jeopardy on the nature and type of inquiries mandated by state law. RB at 22; SG at 23; AG 24, 27. Third, their analysis of precedent shows that *Bullington* rested not solely on the presence of trial-like hallmarks, but on the presence of such hallmarks in conjunction with the ordeal of a capital case. SG at 9, 23-24; AG at 9, 18.

Each of these arguments will be discussed in turn. None support the conclusion that non-capital sentence enhancement trials are dress rehearsals at which a jury's verdict is respected only when it favors the state.<sup>1</sup>

#### A. The Vast Majority Of Non-Capital Sentence Enhancement Trials Involve Neither Prior Conviction Allegations Nor An Inquiry Into The Defendant's Status As A Prior Offender.

Respondent and its amici argue that the factual question to be decided at a sentence enhancement trial is merely one of "status." The jury is simply being asked to decide whether the defendant has suffered prior convictions. According to respondent, this inquiry is "divorced from the defendant's current crime." RB at 12; AG at 9. The simple and straightforward nature of this inquiry implicates none of the policies on which the Double Jeopardy Clause is premised. RB at 9-10; SG at 18-19; AG at 10, 13-14.

There are two fundamental problems with this argument. First, it is arbitrarily limited to sentence enhancement trials involving prior convictions. Significantly, however, the "question presented" by this Court for

---

<sup>1</sup> One of respondent's amici breaks ranks and takes exactly the opposite position. "*Bullington* did not turn on any 'death is different' argument, instead relying primarily upon a 'hallmarks of the trial on guilt or innocence' standard." Amicus Brief of Criminal Justice Legal Foundation ("CJLF") at 4. With characteristic vigor, CJLF argues that any attempt to limit *Bullington* to the capital context "is a feeble, post hoc rationalization." *Ibid.*



review is **not** similarly limited, properly recognizing that many sentence enhancement trials have nothing whatever to do with prior convictions. Indeed, the Amicus Brief of the California Public Defender's Association ("CPDA") makes clear that the majority of sentence enhancement trials in California do not involve even the remotest inquiry into a defendant's "status." CPDA at 13, 20-21. Nor do they depend on facts which are "divorced from the defendant's current crime." Instead, they depend directly upon proof of the defendant's actions or mental state in the underlying, current crime. Thus, the suggestion that Double Jeopardy cannot apply to non-capital sentence enhancement trials because such trials involve a mere status inquiry is simply unfounded.<sup>2</sup>

---

<sup>2</sup> See, e.g., Cal. Pen. Code § 667.8 (if state proves that defendant's intent in the current crime was to facilitate a sexual offense, 9 year enhancement is proper); Cal. Pen. Code § 12022.53(b) (if state proves that defendant used a firearm in the current crime, 10 year enhancement is proper); Cal. Pen. Code § 12022.53(c) (if state proves that defendant discharged a firearm in the current crime, 20 year enhancement is proper); Cal. Pen. Code § 12022.7 (if state proves that defendant inflicted great bodily injury in the current crime, three year enhancement is proper); *People v. Bright*, 12 Cal.4th 652 (1996) (if state proves that defendant premeditated in current charge of attempted murder, sentence may be enhanced to a life term).

The existence of enhancements which depend entirely on the way in which the current crime is committed is not limited to California. See, e.g., 21 U.S.C. § 924(c) (if government proves that defendant carried or used a firearm in the current crime, a 5-30 year enhancement is proper depending on the type of weapon involved.) In no way can it be said that the proof of these sentence enhancements is "divorced from the defendant's current crime."

Even if the question presented for review is limited to trials on prior conviction allegations, however, the argument of respondent and its amici would still have to be rejected. Put simply, the Solicitor General and the state Attorneys General are understandably misinformed about the California scheme at issue in this case.

This may be because California's prior conviction statutes are unlike that of many other states. The California statute at issue here does **not** merely require the state to prove a requisite number of prior felony convictions. Instead, it requires the state to prove that the prior conviction was committed in such a way that it constitutes a "serious felony" as defined under California law. See, e.g., Cal. Pen. Code § 667(a)(4), 667(d)(1).

Thus, under the California scheme, the defendant's status as a prior offender is simply a preliminary fact in the enhancement trial, and one that is usually undisputed. The jury's principal task at this trial is to make findings of historical fact concerning the conduct underlying the prior conviction. This very different inquiry requires the state to affirmatively introduce evidence showing how the prior conviction was committed. In other words, the California scheme does not require proof of a mere "status;" it requires proof of conduct underlying the prior conviction.

Indeed, the critical factual question resolved adversely to the state by the factfinder in a prior crimes sentence enhancement trial is rarely, if ever, the simple "status" question of whether defendant is a prior offender. Instead, it is whether the crime the defendant indisputably committed was committed in a way that makes it a serious felony. The

large number of published California cases on this question show that this inquiry has nothing to do with a defendant's "status" and is anything but simple and straightforward. See, e.g., *People v. Rodriguez*, 17 Cal.4th 253, 261-262 (1998); *People v. Best*, 56 Cal.App.4th 41 (1997); *People v. Williams*, 50 Cal.App.4th 1405 (1996); *People v. Marquez*, 16 Cal.App.4th 115 (1993); *People v. Jackson*, 7 Cal.App.4th 1367 (1992); *People v. Williams*, 222 Cal.App.3d 911 (1990); *People v. Brookins*, 215 Cal.App.3d 1297 (1989).

Where the prior conviction is a theft, for example, the state will often be required to prove defendant's specific intent at the time of the theft. See, e.g., *People v. Marquez*, 16 Cal.App.4th at 122-123; CPDA at 28. Where the prior conviction is a murder, the state may be required to prove defendant's mental state at the time of the homicide. See, e.g., *People v. Maldonado*, 186 Cal.App.3d 863, 866 (1986). Where the prior conviction is an assault, the state must prove that defendant personally used a weapon in the prior offense. See, e.g., *People v. Williams*, 222 Cal.App.3d 911. None of these inquiries have anything to do with defendant's "status" as a prior offender; to the contrary, each assumes that status to have been already proven.<sup>3</sup>

---

<sup>3</sup> Respondent's subsidiary proposition – that proof of sentence enhancements is "divorced from the defendant's current crime" – is no more true in the limited confines of the prior conviction context. See, e.g., Cal. Pen. Code §§ 667(a) (in order to enhance punishment for a prior conviction, the state must prove that the current crime was committed in a way that made it a "serious felony"); 667.7 (in order to enhance punishment for a prior conviction, the state must prove that the current crime involved infliction of great bodily injury or personal use of force); Cal. Health & Safety Code § 11370.2 (in order to enhance punishment for a prior conviction, the state

Respondent and its amici correctly note that the ordeal and anxiety suffered by a defendant at a non-capital sentence enhancement retrial is less than that of a defendant at a second capital sentencing hearing. RB at 12; SG at 18. Respondent explains that in the non-capital context, the defendant begins the sentence enhancement trial "having already suffered the embarrassment of the present conviction." RB at 11. Thus, there is only a "marginal increase in embarrassment" attributable to the sentence enhancement trial. RB at 11. The Solicitor General presents a similar rationale, noting that in non-capital cases, the defendant's primary "concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." SG at 18. These rationales are posited as a reason that Double Jeopardy should not apply to non-capital sentence enhancement trials.

Once again, however, this reasoning is entirely inconsistent with state law. The vast majority of sentence enhancement allegations in California (1) have nothing to do with prior conviction allegations (2) depend entirely on how the defendant commits the current crime and (3) are tried at the same time and to the same jury that determines guilt of the underlying offense. For example, when a defendant is charged with a sentence enhancement for the use of a firearm, his fate on that allegation

---

must prove the nature of defendant's involvement in the current crime); *People v. Equarte*, 42 Cal.3d 456 (1986); CPDA at 23-24; *People v. Monge*, 16 Cal.4th 826, 862-863 (1997) (Werdegar, J. dissenting).



depends entirely on the evidence introduced in connection with the underlying crime and is decided by the same jury at the same time. Thus, the suggestion that Double Jeopardy should not apply to non-capital enhancement trials because the defendant has "already suffered the embarrassment of the present conviction" is – as a matter of state law – wrong.

Indeed, even in the prior conviction context, respondent's rationale is frequently inapplicable. As petitioner noted in his opening brief, unless a party moves to bifurcate trial on a prior conviction allegation, the jury trial on this allegation will occur **at the same time as trial on the charged offenses**. See *People v. Calderon*, 9 Cal.4th 69 (1994); Pet. Br. at 37.

Ultimately, respondent and its amici cannot genuinely be arguing that the protections of Double Jeopardy depend on whether the trial court happens to bifurcate the proceedings. The inquiry into when the sentence enhancement trial is held is a red herring; the applicability of the Double Jeopardy Clause depends on the nature of the trial being held, not on when the trial occurs. As Justice Werdeggar noted in her dissenting opinion below, "[i]n this era of 'Three-Strikes-and-You're-Out,' the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial." *People v. Monge*, 16 Cal.4th at 862. Given the extraordinary penal consequences entailed in many of the enhancement statutes – such as a 20 year term for firearm use or a 25 year-

to-life term for two qualifying prior convictions – Justice Werdeggar was entirely correct.<sup>4</sup>

**B. Where A State Chooses To Provide Certain Procedures Which Are Not Themselves Required By The Constitution, Those Procedures Must Comply With The Constitution.**

Respondent and its amici argue that it would be unsound policy to hinge application of Double Jeopardy on the nature and type of inquiries mandated by state law. RB at 22; SG at 23; AG 24, 27. They argue that this would serve as a strong incentive for individual states to remove hallmarks as a way of avoiding the Double Jeopardy Clause. RB at 22; SG at 23; AG at 24, 27. In addition, amici warns against a parade of horrors; a hallmarks test would require individual application in 50 states and lead to unpredictable and unfair results. AG at 25-27.

The Court has explicitly rejected the "incentive" argument time and time and time again. See, e.g., *Morgan v. Illinois*, 504 U.S. 719, 726-727 (1992); *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Irvin v. Dodd*, 366 U.S. 717,

---

<sup>4</sup> Of course, the entire premise of respondent's argument is that the policies underlying Double Jeopardy do not apply to determinations of mere "status" such as age or the presence of prior convictions. Because the trial at issue here has little to do with status, there is no need to explore this premise in any depth. It is worth noting, however, that for many criminal offenses, proof of status – such as age or criminal history – is an element of the crime itself. See, e.g., Cal. Pen. Code §§ 261.5(a), 271, 288a(b)(2), 290. This Court has never suggested that the state is entitled to multiple chances to prove these "status" elements once a defendant has been acquitted.

721-722 (1961); *Smith v. Bennett*, 365 U.S. 708, 714 (1961). The scope of constitutional protection applicable under a wide variety of constitutional protections depends entirely on what respondent refers to as the "particulars established by each state." RB at 22.

For example, the Constitution does not require states to provide an adversarial preliminary hearing. *Gerstein v. Pugh*, 420 U.S. 103 (1975). If the state chooses to do so, however, that hearing is subject to the Sixth Amendment right to counsel. *Coleman v. Alabama*, 399 U.S. 1 (1970).

The Constitution does not require a state to make malice an element of murder. *Patterson v. New York*, 432 U.S. 197, 198 (1977). If the state chooses to do so, however, that element is subject to the Fifth Amendment requirement of proof beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The Constitution does not require states to provide the right to appeal. *McKane v. Durston*, 153 U.S. 684, 687-688 (1894). If the state chooses to do so, however, that right is subject to the Fourteenth Amendment guarantees of Equal Protection and Due Process. *Evitts v. Lucey*, 469 U.S. at 400-401; *Griffin v. Illinois*, 351 U.S. 12 (1956).

The Constitution does not require states to provide a jury trial at the sentencing phase of a capital trial. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). If the state chooses to do so, however, that jury is subject to the Sixth Amendment requirement of impartiality. *Morgan v. Illinois*, 504 U.S. at 727.<sup>5</sup>

---

<sup>5</sup> Similarly, prior to 1968 the Constitution did not require the use of jury trials in a State's criminal proceedings. *Duncan v.*

These examples should suffice. The argument that constitutional protections cannot hinge on the provisions of state law not only finds no support in the Court's precedents, but has been rejected again and again and again.

Nor does experience in these varied areas support the dire prediction that state legislatures will revise their statutes in order to avoid the Double Jeopardy Clause. In each of the cases cited above, it was the state's voluntary decision to provide certain procedures which subjected those procedures to limits imposed by the federal constitution. Yet there has been no rush by state legislatures to abolish adversarial preliminary hearings, redefine murder statutes to eliminate malice, abolish the right to appeal or do away with juries at capital sentencing. The suggestion that legislatures will revise their laws in order to avoid the commands of the constitution finds no support in any of these areas.

Nothing suggests state legislatures would take a different approach in the Double Jeopardy area. Indeed, the empirical data which does exist supports precisely the opposite conclusion.

As petitioner noted in his opening brief, the vast majority of jurisdictions already apply the hallmarks of trial test to determine the applicability of the Double Jeopardy Clause. Pet. Br. at 29-35. Despite this, to petitioner's knowledge **none** of the legislatures in any of

---

*Louisiana*, 391 U.S. 145, 154 (1968). If the state elected to do so, however, that jury was subject to the Sixth Amendment requirement of impartiality. *Irvin v. Dodd*, 366 U.S. at 721-722.



these states has ever "reconsider[ed] the discretionary procedural benefits they . . . grant to defendants in non-capital sentencing trial[s]." RB at 22.

This empirical evidence also compels rejection of the alternative suggestion that a hallmarks test would be difficult to apply and result in unpredictable outcomes. AG at 25-27. Virtually every jurisdiction to face the Double Jeopardy question **already applies** the hallmarks test. Pet. Br. at 29-35. The results are both consistent and predictable. Only where an enhancement trial provides procedures and requires proof like the trial on the question of guilt or innocence have courts held Double Jeopardy applicable. Pet. Br. at 30-34. Thus, there is no need to speculate on whether the parade of horrors envisioned by amici will occur; experience throughout the country has made clear it will not.<sup>6</sup>

### C. *Bullington* Did Not Depend On The Capital Nature Of The Proceeding At Issue.

To its credit, the Solicitor General recognizes that had *Bullington* rested purely on the capital nature of the proceeding, it would have had to overrule *Stroud v. United States*, 251 U.S. 15 (1919). See Pet. Br. at 24-25. In nevertheless arguing that *Bullington* is limited to the capital context, the Solicitor General proposes that *Bullington* actually rested on two factors: the capital nature of the

---

<sup>6</sup> The hallmarks test has been present in capital litigation since *Bullington*. Significantly, neither respondent nor its amici present any evidence that it has resulted in unpredictable or confusing results in the capital context.

proceeding and the presence of trial-like hallmarks. SG at 9, 23-24. The Solicitor General explains that Double Jeopardy did not apply in *Stroud* because it did not contain the second of these factors – the hallmarks of trial.

This explanation is entirely logical, as far as it goes. It fits *Bullington's* treatment of *Stroud* into an analytic box that both reconciles *Stroud* and permits respondent's argument that *Bullington* was based – at least in part – on the capital nature of the proceeding at issue.

The analysis falls short, however, because it ignores three basic aspects of *Bullington*. First, it ignores *Bullington's* treatment of *United States v. DiFrancesco*, 449 U.S. 117 (1980). If *Bullington* had genuinely rested on the combination of the capital nature of the inquiry and the trial-like hallmarks, the Court could have simply and easily distinguished *DiFrancesco* by relying on the non-capital nature of the sentencing decision at issue there.

Significantly, however, it did not. To the contrary, and in some detail, *Bullington* focused on the "hallmarks of trial" which were absent in *DiFrancesco*, primarily proof beyond a reasonable doubt. It then examined the role played by the factfinder in *DiFrancesco*. *Bullington v. Missouri*, 451 U.S. at 440-441. Of course, not a word of this discussion would have been necessary if *Bullington* had rested, even in part, on the capital nature of the punishment.

Second, the Solicitor General's interpretation of *Bullington* ignores statements made by both the *Bullington* majority and the dissent. The majority stated in no uncertain terms that "[b]ecause of our conclusion on the Double Jeopardy Clause issue, we have no occasion to

address petitioner's claims under the Sixth, Eighth and Fourteenth Amendment." *Bullington v. Missouri*, 451 U.S. at 446, n.17. Dissenting Justice Powell was just as clear, writing that "the Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." 451 U.S. at 451.

Finally, it is significant that not a single case cited in *Bullington* rested on the Court's "death-is-different" jurisprudence. *Bullington v. Missouri*, 451 U.S. at 437-447. Instead, the Court relied on *Specht v. Patterson*, 386 U.S. 605 (1967), a case having nothing to do with capital jurisprudence. *Bullington v. Missouri*, 451 U.S. at 446.

The *Bullington* majority said it was not relying on the Eighth Amendment. The *Bullington* dissent said that the case did not depend on the capital nature of the penalty. Neither the majority nor the dissent cited a single Eighth Amendment case. Moreover, the vast majority of jurisdictions around the country have not confined *Bullington* to the capital context. Pet. Br. at 29-35. *Bullington* should not be confined to the capital context now.<sup>7</sup>

---

<sup>7</sup> Also arguing that *Bullington* should be limited to the capital context, the National Association of Attorneys General suggests that the Double Jeopardy ruling in *Bullington* rests on the notion that "imposition of the death penalty is arguably part of the substantive offense of capital murder." AG at 9. Of course, this was exactly the argument made by capital defendants for years in arguing that the Sixth Amendment right to a jury trial required a jury to impose sentence. The Court has long rejected this argument. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990); *Spaziano v. Florida*, 468 U.S. at 464. *Bullington* plainly did not rest on this discredited theory.

## II. THE CALIFORNIA SENTENCE ENHANCEMENT SCHEME CONTAINS ALL THE HALLMARKS OF A TRIAL ON GUILT OR INNOCENCE.

Assuming *arguendo* that *Bullington* is not limited to capital cases, respondent nevertheless argues that Double Jeopardy would not apply to California sentence enhancement trials because they do not have the hallmarks of trial. RB at 13-19. In advancing this thesis, respondent does not discuss the hallmarks provided at the actual sentence enhancement trial. RB at 13-19. As both the plurality and dissenting decisions below concluded after analyzing these hallmarks, sentence enhancement trials in California have all "the hallmarks of a trial on guilt or innocence." *People v. Monge*, 16 Cal.4th at 836, 870; JA 60, 116-117.

Of course, a state's highest court is the final arbiter of its own law. *Stringer v. Black*, 503 U.S. 222, 234 (1992). This plain statement by the California Supreme Court explains why, as the Solicitor General noted, "the question presented does assume that petitioner's sentencing proceeding had those hallmarks . . . ." SG at 21, n.8.

Instead of focusing on the hallmarks actually provided at the enhancement trial itself, respondent urges the Court to focus on the trial court's subsequent power to dismiss a sentence enhancement allegation in the interests of justice pursuant to California Penal Code section 1385. Respondent argues that this power renders Double Jeopardy inapplicable. RB at 13-18.

As an initial matter, respondent's premise is curious. Respondent purports to argue that California enhancement trials do not possess the hallmarks of a guilt/



innocence trial. To support this argument, respondent relies on a hallmark of trial – the power to dismiss under section 1385 – which state courts have long held applies equally to guilt/innocence and sentence enhancement trials. *See, e.g., People v. Superior Court (Romero)*, 13 Cal.4th 497, 508 (1996); *People v. Superior Court (Howard)*, 69 Cal.2d 491, 501-505 (1968) (court dismisses charged offense pursuant to section 1385); *People v. Cina*, 41 Cal.App.3d 136, 140 (1974).

Putting this aside, the factual predicate for respondent's argument is generally correct. With some exceptions, section 1385 authorizes trial courts to dismiss sentence enhancement allegations after the jury has found them true.<sup>8</sup>

Respondent's thesis is that dismissing such enhancements can lead to an increased flexibility at the actual sentencing hearing. RB at 13-18. Respondent and the Solicitor General both argue that petitioner has mistakenly focused upon the binary nature of the jury's actual verdict. Instead, they argue that the focus should be on the sentencing options which remain if a trial court

---

<sup>8</sup> There are a number of statutory exceptions to this rule. *See, e.g.,* Cal. Pen. Code § 1385(b) and 667(a) (five year enhancement for a prior serious felony not subject to section 1385); Cal. Pen. Code § 12022.53(h) (10 and 20 year firearm use enhancements not subject to section 1385); *People v. Thomas*, 4 Cal.4th 206 (1993) (section 12022.5 firearm use enhancement not subject to section 1385). Under respondent's theory, because these enhancements could **not** be stricken under section 1385, Double Jeopardy would presumably apply.

subsequently exercises discretion to strike a prior conviction allegation after it has been found true. RB at 14, n.7; SG at 21-22.

Of course, the reason petitioner focused on the binary nature of the factfinder's actual sentence enhancement verdict is because it is that verdict to which Double Jeopardy should apply. A focus on the actual determination made by the factfinder – and the limited "yes/no" choice available to the factfinder – is appropriate precisely because it is this decision which should be subject to Double Jeopardy. Double Jeopardy applies to binary determinations of historical fact, not to a trial court's subsequent, discretionary sentence choices.

In support of its position, respondent reasons that if the trial court had exercised its discretion to strike the prior conviction allegation, a range of sentences would have been available to it. Since one of the main reasons Double Jeopardy does not apply to sentencing hearings is because the sentencer is exercising a broad ranging discretion, the discretion to strike the enhancement allegation brings non-capital sentencing enhancement trials within the safe harbor of traditional sentencing.

In a sense, of course, respondent is entirely correct. A trial court's discretionary decision at sentencing to strike a sentence enhancement allegation is not subject to Double Jeopardy protection. Nor is a trial court's discretionary sentencing decision subject to Double Jeopardy

protection. Both decisions may be appealed by the state under Penal Code § 1238(a)(10).<sup>9</sup>

Yet the existence of these normative sentencing procedures after a formal trial at which a jury renders a yes/no verdict on whether the state has proven its case is irrelevant to the Double Jeopardy question presented. The question is whether Double Jeopardy applies to the jury's verdict on the actual sentence enhancement, not whether it applies to the trial court's subsequent subjective sentencing decisions. The existence of such discretionary powers down the road at sentencing is irrelevant to the question of whether the factfinder's initial acquittal should or will be respected.

---



---

<sup>9</sup> Respondent suggests in passing that a jury's finding of insufficient evidence to support a sentence enhancement may be appealed. RB at 18-19. The suggestion is wrong. The People may appeal a trial court's decision to dismiss a sentence enhancement allegation under section 1385. See Penal Code § 1238(a)(10). The People have no authority under that section, or any other provision of California law, to appeal a jury's finding that the state presented insufficient evidence to support a sentence enhancement.

## CONCLUSION

The state was entitled to one bite at the apple. They are now asking for the entire bushel. The decision of the California Supreme Court should be reversed.<sup>10</sup>

Respectfully submitted,

CLIFF GARDNER\*  
GARDNER & DERHAM  
900 North Point  
Suite 220  
San Francisco, CA 94109  
(415) 922-9404

*Counsel for Petitioner*

*\* Counsel of Record*

---

<sup>10</sup> Petitioner has addressed those portions of respondent's briefing which are responsive to the actual question presented by the Court in its January 16, 1998 order. He recognizes that, as a fallback position, respondent and one of its amici have asked the Court to overrule *Bullington*. RB at 20-22; CJLF at 1-30. This issue is not within the question presented by the Court. Nor was the issue raised in respondent's Brief in Opposition to Petition for Writ of Certiorari. As a general matter, when the Court wants briefing on whether a precedent should be overruled, and that issue has not been presented in either the certiorari petition or brief in opposition, the Court's practice is to issue an order directing the parties to address the issue. See, e.g., *Payne v. Tennessee*, 498 U.S. 1076 (1991); *Moragne v. United States*, 369 U.S. 952 (1969). See generally Stern & Gressman, *Supreme Court Practice* at § 6.25 at p. 341 (7th Ed. 1993).



MAR 27 1998

No. 97-6146

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1997

ANGEL J. MONGE, PETITIONER

v.

CALIFORNIA

ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF CALIFORNIA

**BRIEF FOR THE  
UNITED STATES AS AMICUS CURIAE  
SUPPORTING RESPONDENT**

SETH P. WAXMAN  
*Solicitor General  
Counsel of Record*

JOHN C. KEENEY  
*Acting Assistant Attorney  
General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

MATTHEW D. ROBERTS  
*Assistant to the Solicitor  
General  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

31P4

### **QUESTION PRESENTED**

Does the Double Jeopardy Clause apply to non-capital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?



## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Constitutional provision involved .....	2
Statement .....	2
Summary of argument .....	6
Argument:	
The Double Jeopardy Clause does not bar petitioner's resentencing .....	8
A. The Double Jeopardy Clause's prohibition on reprosecution after an acquittal generally does not apply to sentencing .....	9
B. The <i>Bullington</i> exception does not apply to noncapital sentencing .....	11
C. The presence of procedural protections at petitioner's noncapital sentencing does not bar his resentencing .....	20
Conclusion .....	25

## TABLE OF AUTHORITIES

### Cases:

<i>Almendarez-Torres v. United States</i> , No. 96-6839 (Mar. 24, 1998) .....	11, 17, 24
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984) .....	13, 23
<i>Ball v. United States</i> , 470 U.S. 856 (1985) .....	11
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983) .....	14, 16
<i>Bozza v. United States</i> , 330 U.S. 160 (1947) .....	10
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981) ....	5, 6, 8, 13, 18, 19, 20, 23, 24
<i>Burks v. United States</i> , 437 U.S. 1 (1978) .....	9, 12
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994) .....	6, 8, 13, 14, 16, 19
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973) .....	10
<i>Chandler v. Fretag</i> , 348 U.S. 3 (1954) .....	24

## IV

Cases— Continued:	Page
<i>Chewning v. Cunningham</i> , 368 U.S. 443 (1962) .....	23-24
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981) .....	15, 16
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972) .....	8, 13, 16, 23
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977) .....	15, 16, 18, 25
<i>Green v. Georgia</i> , 442 U.S. 95 (1979) .....	15
<i>Green v. United States</i> , 355 U.S. 184 (1957) .....	17
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	14, 23
<i>Gryger v. Burke</i> , 334 U.S. 728 (1948) .....	10
<i>Hollis v. Smith</i> , 571 F.2d 685 (2d Cir. 1978) .....	24
<i>Kansas v. Hendricks</i> , 117 S. Ct. 2072 (1997) .....	22
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) .....	14
<i>Lockhart v. Nelson</i> , 488 U.S. 33 (1988) .....	9, 12
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986) ..	11, 17, 24
<i>Mempa v. Rhay</i> , 389 U.S. 128 (1967) .....	24
<i>Missouri v. Hunter</i> , 459 U.S. 359 (1983) .....	10
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969) .....	10
<i>Oyler v. Boles</i> , 368 U.S. 448 (1962) .....	23, 24
<i>Pennsylvania v. Goldhammer</i> , 474 U.S. 28 (1985) .....	6, 13
<i>People v. Monge</i> , No. KA025876 (L.A. Super. Ct., Dep't East E, Jan. 7, 1998) .....	19-20
<i>People v. Superior Court (Romero)</i> , 917 P.2d 628 (Cal. 1996) .....	22
<i>People v. White Eagle</i> , 56 Cal. Rptr.2d 749 (5th Ct. App. 1996) .....	22
<i>Poland v. Arizona</i> , 476 U.S. 147 (1986) .....	21
<i>Price v. Georgia</i> , 398 U.S. 323 (1970) .....	10
<i>Sawyer v. Whitley</i> , 505 U.S. 333 (1992) .....	18
<i>Schiro v. Farley</i> , 510 U.S. 222 (1994) .....	8, 16
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984) .....	11, 18, 23
<i>Specht v. Patterson</i> , 386 U.S. 605 (1967) .....	23
<i>Stroud v. United States</i> , 251 U.S. 15 (1919) .....	23
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	7, 14, 15, 16
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948) .....	23

## V

Cases— Continued:	Page
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980) .....	8, 9, 18, 19
<i>United States v. Watts</i> , 117 S. Ct. 633 (1997) .....	10
<i>Williams v. New York</i> , 337 U.S. 241 (1949) .....	11
<i>Winship, In re</i> , 397 U.S. 358 (1970) .....	11
<i>Witte v. United States</i> , 515 U.S. 389 (1995) .....	10
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) ..	14
Constitution, statutes and rules:	
U.S. Const.:	
Amend. V:	
Double Jeopardy Clause .....	<i>passim</i>
Self-Incrimination Clause .....	15, 16
Amend. VI:	
Confrontation Clause .....	11
Right to Counsel Clause .....	15, 24, 25
Amend. VIII .....	14
Amend. XIV (Due Process Clause) .....	4, 15, 17, 23, 25
Cal. Health & Safety Code (West 1991):	
§ 11359 .....	2, 22
§ 11360(a) .....	2, 22
§ 11361(a) .....	2, 22
Cal. Penal Code (West Supp. 1998):	
§ 245(a)(1) .....	3
§ 654(a) .....	22
§ 667.5 .....	3, 4
§ 667(b)-(i) .....	3
§ 667(d)(1) .....	3
§ 667(e)(1) .....	4
§ 1170(b) .....	22
§ 1170.12(a)-(e) .....	3
§ 1192.7(c)(23) .....	3
§ 1385(a) .....	22
Cal. Rules of Court (West 1997):	
Rule 408(a) .....	22
Rule 420 .....	22



## Rules—Continued:

## Page

Rule 421 .....	22
Rule 423 .....	22

## In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-6146

ANGEL J. MONGE, PETITIONER

*v.*

CALIFORNIA

ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF CALIFORNIA

**BRIEF FOR THE  
UNITED STATES AS AMICUS CURIAE  
SUPPORTING RESPONDENT**

**INTEREST OF THE UNITED STATES**

This case presents the question whether the prohibition that the Double Jeopardy Clause imposes on reprosecution after an acquittal of substantive criminal charges applies to noncapital sentencing proceedings. Because the United States as a prosecuting authority is a party to many of those proceedings, and because resentencings are frequently required under the Federal Sentencing Guidelines, the United States has a significant interest in the Court's disposition of this case.

### CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall \* \* \* be subject for the same offence to be twice put in jeopardy of life or limb."

### STATEMENT

1. On January 25, 1995, undercover officers of the Pomona Police Department who were driving an unmarked car spotted a 13-year-old boy, who motioned for them to pull over. The officers stopped at the rear of an adjacent apartment complex, where police had earlier observed narcotics activity. J.A. 49. Petitioner approached the officers, who asked where they could buy marijuana. Petitioner left for a few minutes, and, on his return, gave the boy, who had arrived in the meantime, several plastic bags. J.A. 49-50. The boy approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two \$10 bills for two plastic bags of marijuana. After leaving, the officers notified other police officers, who arrested petitioner and the boy. Upon searching petitioner, the police found the \$10 bills that the officers had given the boy. J.A. 50.

2. Petitioner was charged with one count of using a minor to sell marijuana, in violation of California Health & Safety Code § 11361(a) (West Supp. 1998), one count of sale or transportation of marijuana, in violation of California Health & Safety Code § 11360(a) (West Supp. 1998), and one count of possession of marijuana for sale, in violation of California Health & Safety Code § 11359 (West Supp. 1998). The district attorney also made two allegations relevant to petitioner's sentence should he be convicted: first, that petitioner had a prior serious felony conviction

(strike) under California's Three Strikes Law, California Penal Code § 667(b)-(i) (West Supp. 1998);<sup>1</sup> and, second, that petitioner had served a prior prison term under California Penal Code § 667.5 (West Supp. 1998). Specifically, the district attorney alleged that petitioner had a July 2, 1992, conviction and prison term for assault with a deadly weapon, in violation of California Penal Code § 245(a)(1) (West Supp. 1998). J.A. 50.

In California Superior Court, petitioner pleaded not guilty to the charged offenses and denied the sentencing allegations. J.A. 50. He waived his right to a jury determination of the truth of the sentencing allegations and requested that the court pass on the allegations in a proceeding separate from the trial on the substantive offenses. The court granted petitioner's request, and a jury found him guilty of the substantive charges. J.A. 50-51.

3. On June 12, 1995, the proceedings reconvened for the determination of the truth of the sentencing allegations and the sentencing. J.A. 9-24. The prosecutor argued that the 1992 assault conviction was a prior serious felony under the Three Strikes Law, which classes assault with a deadly weapon as a "serious felony" if the defendant personally used the weapon, see California Penal Code §§ 667(d)(1), 1192.7(c)(23) (West Supp. 1998). The prosecutor explained that the charge to which petitioner pleaded guilty in the prior case was that he "committed a

<sup>1</sup> The Three Strikes Law was first enacted by the California legislature and codified at California Penal Code § 667(b)-(i) (West Supp. 1998). A substantively identical provision was later enacted by public initiative and codified at California Penal Code § 1170.12(a)-(e) (West Supp. 1998). For clarity, all citations in this brief are to the legislatively enacted provision.



crime of assault with a deadly weapon, to wit, a stick upon the victim \* \* \* and there w[ere] no other defendants." J.A. 12. Petitioner's counsel countered that a stick is not a "deadly weapon." J.A. 13. The court ruled that it could not "reweigh the issue" because "it was alleged a deadly weapon and [petitioner] pled guilty to that." J.A. 14, 51. The court stated that it was taking judicial notice of the conviction in the prior case. J.A. 15, 51. The prosecutor asked the court also to consider a "prior package," including an abstract of judgment, *ibid.*, which was received into evidence, as noted on the June 12, 1995, minute order. J.A. 7, 16, 51. The court then found true both sentencing allegations. J.A. 16, 51-52.

The court imposed an 11-year sentence, including five years on the first count, which the court doubled under the Three Strikes Law, California Penal Code § 667(e)(1) (West Supp. 1998), and a one-year enhancement for the prior prison term, under California Penal Code § 667.5 (West Supp. 1998). The court imposed a three-year sentence on count two, which the court stayed, and a two-year sentence on count three, which the court ordered petitioner to serve concurrently with the sentence on count one. J.A. 20, 52. When pronouncing the sentence, the court reiterated that "the issue on the prior \* \* \* was submitted to me based upon evidence contained in [the] court file [from the prior offense]" as well as the prison package. J.A. 18.

4. Petitioner appealed, challenging the Three Strikes Law as a violation of due process. J.A. 52. On its own motion, the California Court of Appeal requested briefing on whether sufficient evidence supported the finding of the prior serious felony. J.A. 27-

29, 52. The Court of Appeal reversed the finding, ruling that the only evidence actually before the Superior Court was the prison package, and that evidence was insufficient to show personal use of the weapon. J.A. 42-45. The Court of Appeal also held that a redetermination of the truth of the allegation would be barred by the federal and state Double Jeopardy Clauses. J.A. 46.

5. The Supreme Court of California reversed the Court of Appeal on the double jeopardy issue. J.A. 75. The state Supreme Court noted (J.A. 57) this Court's historic reluctance to apply the Double Jeopardy Clause to sentencing determinations. It acknowledged (J.A. 58-59), however, that the Court made an exception in *Bullington v. Missouri*, 451 U.S. 430 (1981), which held that a defendant, sentenced to life imprisonment rather than death in a capital sentencing proceeding that had all "the hallmarks of the trial on guilt or innocence," *id.* at 439, could not be resentenced to death on retrial following appeal. The California Supreme Court stated that, "[o]n its face," a proceeding to determine the truth of a strike allegation has "the hallmarks of the trial on guilt or innocence" but determined that the *Bullington* exception nonetheless does not apply to this case. J.A. 60. The state court noted that this Court has repeatedly suggested that *Bullington* does not apply to noncapital sentencing proceedings. J.A. 61. The court further explained that the sentencing proceedings here and in *Bullington* are "more unlike than alike," principally because of the absence in this case of statutorily defined aggravating and mitigating circumstances comparable to those in *Bullington*. J.A. 62. In addition, the court noted, the level of embarrassment, expense, and anxiety involved in the

sentencing proceeding here is far less than the level in capital sentencing proceedings and not "equivalent to that faced \* \* \* at the guilt phase" of a trial. J.A. 63 (quoting *Bullington*, 451 U.S. at 445). Finally, the California Supreme Court explained that a strike finding is "merely a determination, for purposes of punishment, of the defendant's *status*, which \* \* \* is readily determinable from the public record" (J.A. 63) and indeed may only be ascertained "from the *record* of the prior conviction" (J.A. 64). Given those distinctions, the court held that the Double Jeopardy Clause of the United States Constitution does not bar a redetermination of the truth of the strike allegation. J.A. 65, 71.<sup>2</sup>

#### SUMMARY OF ARGUMENT

This Court has "traditional[ly] refus[ed] to extend the Double Jeopardy Clause to sentencing." *Caspari v. Bohlen*, 510 U.S. 383, 392 (1994). In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Court recognized a narrow exception to the principle that the Double Jeopardy Clause does not bar resentencing. The Court held that, once a defendant has been convicted of capital murder but sentenced only to life imprisonment in a proceeding that "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence," he cannot, after retrial following appeal, be sentenced to death. *Id.* at 438.

*Bullington* should not be extended to noncapital sentencing proceedings. This Court has suggested that *Bullington* is limited to capital cases, see, e.g., *Bohlen*, 510 U.S. at 392-393; *Pennsylvania v. Gold-*

*hammer*, 474 U.S. 28, 30 (1985), and that suggestion is sound. A critical component of *Bullington's* rationale does not apply to noncapital sentencing. Resentencing in a noncapital case does not expose a defendant to the anxiety and ordeal of a trial on guilt or innocence or to any risk equivalent to the risk of an erroneous finding of guilt. *Bullington* is therefore best viewed as one in a series of cases in which the Court has demonstrated "an especially vigilant concern for procedural fairness" in capital sentencing. *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part).

A State's voluntary decision to surround a particular noncapital sentencing proceeding with hallmarks of a trial on guilt or innocence is not sufficient to justify the application of *Bullington's* double jeopardy rule. As a general matter, the "hallmarks" of a trial on guilt or innocence are not present in noncapital sentencing. Nor were they present in the proceeding at issue in this case. But even if they were, *Bullington* does not apply solely because the State voluntarily provides procedural protections. Rather, the applicability of *Bullington* depends both on the presence of those procedural hallmarks *and* on the unique stresses and anxieties experienced by a defendant facing the risk of a sentence of death. Petitioner's exposure to an enhancement of his term of imprisonment imposes no comparable ordeal.

<sup>2</sup> The California Supreme Court also held that the double jeopardy provision of the California Constitution does not bar a redetermination of the truth of the allegation. J.A. 72-74.



## ARGUMENT

### THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PETITIONER'S RESENTENCING

Under the Double Jeopardy Clause, an acquittal of a substantive criminal charge, whether rendered at trial or by a finding of insufficient evidence on appeal, finally disposes of the case and bars retrial. See *United States v. DiFrancesco*, 449 U.S. 117, 129-130 (1980). This Court has not recognized a similar finality in the pronouncement of a sentence, however. Rather, the Court has "traditional[ly] refus[ed] to extend the Double Jeopardy Clause to sentencing." *Caspari v. Bohlen*, 510 U.S. 383, 392 (1994).

In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Court recognized a "narrow exception" to the principle that the Double Jeopardy Clause's bar on re prosecution after an acquittal of substantive criminal charges does not apply to sentencing determinations. *Schiro v. Farley*, 510 U.S. 222, 231 (1994). The Court held that, once a defendant has been convicted of the offense of capital murder but sentenced only to life imprisonment in a proceeding that "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence," he cannot, after retrial following appeal, be sentenced to death. *Bullington*, 451 U.S. at 438.

*Bullington's* rationale had two critical components: First, the "unique" capital sentencing proceedings in Missouri after *Furman v. Georgia*, 408 U.S. 238 (1972), see *Bullington*, 451 U.S. at 442 n.15, had all "the hallmarks of the trial on guilt or innocence." *Id.* at 439. The decision not to impose the death penalty was therefore tantamount to an "acquittal" of that

penalty. *Id.* at 445. Second, because the anxiety and ordeal suffered in capital sentencing are "at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," and, because retrial would pose an "unacceptably high risk" of "an erroneously imposed death sentence," the Double Jeopardy Clause prohibits retrial. *Ibid.* The principal issue in this case is whether the *Bullington* exception applies outside the capital sentencing context.<sup>3</sup> This Court should confirm that *Bullington* applies only to sentencing in capital cases.

#### A. The Double Jeopardy Clause's Prohibition On Reprosecution After An Acquittal Generally Does Not Apply To Sentencing

"[T]he pronouncement of sentence has never carried the finality that attaches to an acquittal" of a substantive offense. *DiFrancesco*, 449 U.S. at 133. At common law, a judge could increase a sentence

<sup>3</sup> This case does not, however, entail a straightforward application of *Bullington*. In that case, the petitioner was "acquitted" of the death penalty at his initial sentencing proceeding. Here, the sentencing court did not "acquit" petitioner of the strike allegation but instead found that the allegation was true. The "acquittal" occurred when the Court of Appeal found the evidence insufficient to support that finding. As a general matter, "the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below." *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988). An exception to that rule exists when a defendant's conviction is reversed solely because the evidence was insufficient to sustain the verdict. *Burks v. United States*, 437 U.S. 1, 18 (1978). The *Burks* exception does not apply, however, when an appellate court finds the evidence insufficient because it determines that some of the evidence was inadmissible and the remaining evidence cannot support the verdict. *Nelson*, 488 U.S. at 40.

imposed on a defendant at any time during the term of court in which the judge imposed the original sentence. *Id.* at 133-134. This Court has therefore held that a trial court may correct an error in sentencing after the sentence has been pronounced. See *Bozza v. United States*, 330 U.S. 160, 166-167 (1947). In addition, the Double Jeopardy Clause does not bar government appeals of sentences. *DiFrancesco*, 449 U.S. at 133-134. And “the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction.” *North Carolina v. Pearce*, 395 U.S. 711, 719-721 (1969); see also *Chaffin v. Stynchcombe*, 412 U.S. 17, 23-24 (1973).

There is no double jeopardy bar to the use of prior convictions in sentencing a persistent offender. See, e.g., *Gryger v. Burke*, 334 U.S. 728, 732 (1948). There is no double jeopardy bar to consideration in sentencing of conduct of which a defendant has been acquitted. See *United States v. Watts*, 117 S. Ct. 633, 636 (1997) (per curiam). And there is no bar to prosecution and conviction for conduct that was used to enhance punishment in a prior sentencing proceeding. See *Witte v. United States*, 515 U.S. 389, 398-399 (1995).

The limitations on the applicability of the Double Jeopardy Clause to sentencing reflect the fundamental distinction recognized by our criminal justice system between determining guilt and imposing sentence. A determination of guilt does more than authorize a government to impose punishment; it brands the person found guilty with a virtually indelible stigma in the eyes of his community and carries enormous collateral consequences. See, e.g., *Price v. Georgia*, 398 U.S. 323, 331 n.10 (1970); *Missouri v. Hunter*, 459 U.S. 359, 373 (1983) (Mar-

shall, J., dissenting); *Ball v. United States*, 470 U.S. 856, 865 (1985). The guilt determination is thus subject to unique constitutional protections. The government must prove guilt of a substantive offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). Proof at trial is subject to the Confrontation Clause of the Sixth Amendment; and, for serious offenses, the defendant is entitled to a trial by jury.

The sentencing process, in contrast, may be more flexible. Generally, the government need only satisfy the preponderance of the evidence standard. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986); cf. *Almendarez-Torres v. United States*, No. 96-6839 (Mar. 24, 1998), slip op. 24. The sentence may be (and in noncapital cases, typically is) imposed by the court rather than a jury. See *Spaziano v. Florida*, 468 U.S. 447, 457-465 (1984). And the Confrontation Clause does not limit the evidence that the sentencer may consider. Rather, the sentence may be based on “the fullest information possible concerning the defendant’s life and characteristics.” *Williams v. New York*, 337 U.S. 241, 247 (1949).

#### **B. The *Bullington* Exception Does Not Apply To Non-capital Sentencing**

*Bullington*’s exception to the principle that there is no double jeopardy bar on resentencing is limited to capital cases. This Court has suggested that *Bullington* does not apply outside capital sentencing. That limitation makes sense because, as the Court has frequently observed, death is a qualitatively different kind of punishment that may implicate different constitutional protections, and *Bullington*’s



rationale does not carry over to noncapital sentencing.<sup>4</sup>

1. Although the *Bullington* Court did not expressly limit its holding to capital sentencing, much in the opinion suggests that limitation. In *Bullington*, the Court "distinguished [its] contrary precedents, particularly *DiFrancesco*, on the ground that

---

<sup>4</sup> It is not clear that the rule of *Burks*, see note 3, *supra*, would properly apply here even if *Bullington* were extended. The Court of Appeal characterized this case as involving "insufficient evidence" (J.A. 41), but it may more appropriately be viewed as involving a trial error similar to the error in *Nelson*, *supra*. In *Nelson*, sufficient inadmissible evidence supported the verdict but the admissible evidence was insufficient. 488 U.S. at 40. Here, at the proceeding on the strike allegation, which was "more like an informal hearing than a trial" (J.A. 64), the Superior Court stated that it was taking judicial notice of the conviction in the prior case in addition to receiving in evidence the prison package. J.A. 15. The prosecutor argued that a prior serious felony was proved because petitioner was the only defendant in that case, which involved an assault with a stick. J.A. 12. When sentencing petitioner on the underlying offense, the court reiterated that "the issue on the prior \* \* \* was submitted to me based upon evidence contained in [the] court file [from the prior offense]." J.A. 18. Evidence in the record of the prior case (which the court would have been entitled to consider, J.A. 44) in fact establishes that petitioner himself wielded the stick in committing the prior felony. See page 19, *infra*. The Court of Appeal determined, however, that, because the minutes reflected that only the prison package was received into evidence (J.A. 42 n.4), that was the only evidence actually before the Superior Court, and the court's finding was therefore based on insufficient evidence that petitioner personally used the weapon, J.A. 43-44 & nn. 5-7. At the very least, the circumstances of this case indicate the difficulty of applying the notion of an acquittal based on insufficient evidence to a noncapital sentencing determination.

[t]he history of sentencing practices is of little assistance to Missouri in this case, since the sentencing procedures for capital cases instituted after the decision in *Furman* [v. *Georgia*, 408 U.S. 238 (1972),] are unique.'" *Bohlen*, 510 U.S. at 392 (quoting *Bullington*, 451 U.S. at 441-442 n.15). The *Bullington* Court took care to distinguish the "usual sentencing proceeding" from the capital sentencing at issue (*id.* at 443) and to reaffirm the general inapplicability to sentencing of the Double Jeopardy Clause's prohibition on retrial after acquittal (*id.* at 437-438). *Bullington* involved sentencing by a jury, but in *Arizona v. Rumsey*, 467 U.S. 203 (1984), this Court applied *Bullington* to capital sentencing by a judge. In describing *Bullington*, the Court noted that *Bullington* equated "the anxiety and ordeal suffered by a capital defendant in Missouri's capital sentencing proceeding" with the degree of suffering experienced by a defendant at the guilt stage of a trial. *Rumsey*, 467 U.S. at 209.

Later cases have explained that "[b]oth *Bullington* and *Rumsey* were capital cases, and [the Court's] reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." *Bohlen*, 510 U.S. at 392. In *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985) (per curiam), four years after *Bullington*, the Court reaffirmed that the Double Jeopardy Clause does not bar resentencing after an appeal in a noncapital case. The Court reiterated that "the decisions of this Court 'clearly establish that sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.'" *Id.* at 30 (bracketed phrase included by the *Goldhammer* Court). The Court subsequently explained that *Goldhammer* "strongly

suggested that *Bullington* was limited to capital sentencing." *Bohlen*, 510 U.S. at 393.

2. This Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding." *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part). For that reason, "[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Bohlen*, 510 U.S. at 392 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 913-914 (1983) (Marshall, J., dissenting) (citing *Bullington* as an example of this practice)).

As petitioner's amicus National Association of Criminal Defense Lawyers notes (Br. 5), many of the special protections in capital sentencing have been grounded in the Eighth Amendment. Most basically, in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court held that sentencing discretion that is routinely tolerated in noncapital cases is impermissible in capital cases. See *id.* at 189 (plurality opinion of Stewart, J.). See also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, J.) (holding mandatory death sentences unconstitutional but acknowledging that the practice of "individualized sentencing determinations [in the noncapital context] generally reflects simply enlightened policy rather than a constitutional imperative"); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Burger, C.J.) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

The Court's "death is different" rulings, however, have also been grounded in other constitutional provisions. In *Gardner v. Florida*, 430 U.S. 349 (1977), for example, the Court held that "due process" prohibits imposition of a death sentence based in part on information which the defendant had no opportunity to deny or explain. *Id.* at 362 (plurality opinion of Stevens, J.). Justice Stevens explained that the outcome in that case depended in part on the recognition that "death is a different kind of punishment from any other which may be imposed in this country." *Id.* at 357. In *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), the Court held that the Due Process Clause requires that a defendant be allowed to introduce at capital sentencing hearsay evidence supporting his contention that he did not participate directly in the murder. In dissent, then-Justice Rehnquist noted the unusual nature of the ruling and attributed it to the fact that the case involved the death penalty. See *id.* at 98 (Rehnquist, J., dissenting).

The Court has also held that, in judging a claim of ineffectiveness of counsel in violation of the Sixth Amendment, the same standard applies at capital sentencing and at trial on a substantive offense, even though a more relaxed standard may apply at ordinary sentencing. *Strickland*, 466 U.S. at 686. And, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that the Fifth Amendment precludes the use at capital sentencing of statements made by a defendant during a court-ordered psychiatric examination, unless the defendant was informed that he could remain silent and that any statements he made might be used against him at sentencing. Although the statements were used "only to determine punishment after conviction, not to establish guilt," the Court held that



the Fifth Amendment applied “[g]iven the gravity of the decision made at the penalty phase.” *Id.* at 362-363.<sup>5</sup>

3. Viewing *Bullington* in the context of those cases and limiting its holding to capital sentencing is sensible, because a critical component of *Bullington*’s rationale does not carry over to noncapital sentencing. As we explained at pages 8-9, *supra*, one key ingredient supporting *Bullington*’s holding was the Court’s perception that the sentencing proceeding at issue had all the hallmarks of the immediately preceding trial on capital murder, so a sentence of life imprisonment could be interpreted as an “acquittal” of a death sentence.<sup>6</sup> An equally essen-

<sup>5</sup> Every member of the *Bullington* majority has authored an opinion subscribing to the view that the difference between the death penalty and other punishments warrants imposition of special protections at capital sentencing. See, e.g., *Schiro*, 510 U.S. at 238 (Blackmun, J.) (“The unique nature of modern capital sentencing proceedings identified in *Bullington* derives from the fundamental principle that death is ‘different,’ and that heightened reliability is required at all stages of the capital trial.” (internal citations omitted)); *Strickland*, 466 U.S. at 704-705 (Brennan, J.); *Barefoot*, 463 U.S. at 913-914 (Marshall, J.); *Gardner*, 430 U.S. at 357 (Stevens, J.); *Furman*, 408 U.S. at 306 (Stewart, J.).

<sup>6</sup> In our amicus brief and argument to the Court in *Caspari v. Bohlen*, *supra*, we focused on this component of the *Bullington* rationale, consistent with the absence from the sentencing proceeding in *Bohlen* of the hallmarks of the immediately preceding trial on guilt or innocence. See 92-1500 U.S. Amicus Br. at 17-19. Our focus on the “hallmarks” aspect of *Bullington* does not mean, however, that it is the sole requirement for application of the *Bullington* exception. As we have explained, existence of the hallmarks of the trial on the underlying offense is a necessary but not sufficient precondition to *Bullington*’s bar on resentencing. The question presented in

tial ingredient, however, was that the animating principles of the Double Jeopardy Clause require that the same finality accorded to an acquittal of guilt on substantive charges also attach to the “acquittal” of a death sentence, because of the ordeal experienced by the defendant in a formal proceeding to impose the death penalty. That prerequisite is not satisfied in noncapital cases.<sup>7</sup>

As the Court explained in *Bullington*, 451 U.S. at 445, the central purpose of the Double Jeopardy Clause is to prevent “repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187-188 (1957). The ordeal and anxiety suffered by a defendant at the

this case presupposes that the sentencing proceeding here possessed the hallmarks of the trial on guilt or innocence. As we explain *infra* at pages 20-22, we believe the proceeding in fact lacked certain critical features of a criminal trial, but *Bullington*’s inapplicability to noncapital sentencing proceedings does not depend on that view.

<sup>7</sup> Contrary to the assertion of petitioner’s amicus California Public Defenders Association (Br. 21-22), a refusal to extend *Bullington* to noncapital sentencing will not give the States license to avoid the Double Jeopardy Clause by redefining elements of a substantive offense as sentencing enhancements. The Due Process Clause would provide a check against redefinition of the elements of an underlying offense as sentencing enhancements to such an extent that the enhancements became “a tail which wag[ged] the dog of the substantive offense,” *McMillan*, 477 U.S. at 88. The Three Strikes Law, a recidivist enhancement, certainly poses no such risk. See *Almendarez-Torres*, slip op. 15-23.

penalty phase of a capital murder trial are "at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." *Bullington*, 451 U.S. at 445; see also *Rumsey*, 467 U.S. at 209; *Spaziano*, 468 U.S. at 458. That is true because a death sentence "is different [from other sentences] in both its severity and its finality." *Gardner*, 430 U.S. at 357. A defendant who has once run the gauntlet of a capital sentencing proceeding attended by all the formality of a trial, and who has received a noncapital sentence, has suffered an ordeal that has no counterpart in the criminal process, except for the trial on guilt itself.

In a noncapital case, however, "[t]he defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." *DiFrancesco*, 449 U.S. at 136. Of course, ordinary resentencing entails some additional anxiety and insecurity. But some uncertainty is unavoidable in the sentencing context because the "Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 136-137. For example, probation or parole may be revoked and imprisonment imposed after the pronouncement of sentence, thus upsetting the defendant's expectation of release. The Double Jeopardy Clause, however, does not protect that expectation.

Resentencing in noncapital cases also does not subject the defendant to "risk of being harassed and then convicted, although innocent." *DiFrancesco*, 449 U.S. at 136. Although this Court has recognized the concept of "innocence" of the death penalty, see *Bullington*, 451 U.S. at 445; *Sawyer v. Whitley*, 505 U.S. 333 (1992), it has not recognized the notion of

"innocence" of a noncapital sentence. The concepts of "innocence" and "error" make little sense in traditional sentencing, in which the sentencer makes a highly discretionary choice among a range of possible sentences. See *Bullington*, 451 U.S. at 443-444; *DiFrancesco*, 449 U.S. at 136-137.

In the context of a sentencing enhancement determination, such as the finding on the strike allegation here, the concept of "error" has more meaning. If petitioner had not been convicted of a prior serious felony, then a finding that the strike allegation was true would be erroneous. Redetermination of the truth of the allegation should nevertheless be permitted, because redetermination will reduce, rather than increase, the likelihood of error. As the California Supreme Court explained (J.A. 63-65), the strike finding requires only a determination of status, and the admissible evidence is limited to the prior record. Strike status is thus

a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.

*Bohlen*, 510 U.S. at 396. In fact, on remand from the California Supreme Court in this case, the Superior Court found that the record in petitioner's 1992 assault case established that he personally used the weapon and therefore supported the strike allegation. See *People v. Monge*, No. KA025876 (L.A. Super. Ct.,



Dep't East E., Jan. 7, 1998). Thus, a prohibition on resentencing might reduce, rather than increase, the accuracy of sentencing proceedings without advancing the core values underlying the Double Jeopardy Clause.

**C. The Presence Of Procedural Protections At Petitioner's Noncapital Sentencing Does Not Bar His Resentencing**

Petitioner contends that the Double Jeopardy Clause prohibits his resentencing because his sentencing proceeding had the hallmarks of a trial on a substantive offense. Even if petitioner were correct that the existence of a bar on resentencing turns solely on whether a sentencing proceeding has those hallmarks, he would not prevail here. The hallmarks identified by *Bullington* are rarely, if ever, present in noncapital sentencing, and they were not present at petitioner's sentencing proceeding. In any event, petitioner is incorrect that the mere presence of procedural protections at sentencing triggers a bar on resentencing.

1. *Bullington* identified three critical "hallmarks": First, the sentencer was limited to two options. See 451 U.S. at 438. Second, the sentencer's discretion was significantly curtailed by specific substantive standards, and the sentencing decision was based on evidence introduced in a trial-like proceeding. *Ibid.* Third, the prosecution had to prove certain facts beyond a reasonable doubt. *Ibid.* Those hallmarks are generally not present in noncapital sentencing. The sentencer typically has a broad range of options. The Constitution does not require rigid substantive standards or trial-like proceedings,

and those generally are not provided. Finally, proof is usually by preponderance of the evidence.

Even in this case, in which California chose to provide many procedural protections at sentencing, the critical *Bullington* hallmarks were not present.<sup>8</sup> In arguing that those hallmarks were present, petitioner mistakenly focuses (Pet. Br. 36-38) solely on the strike determination. Petitioner overlooks that sentencing always involves factual determinations. Those determinations, even if they must be based on proof beyond a reasonable doubt and made under trial-like conditions in a capital case, are not equivalent to "acquittals" or "convictions." See *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (finding on particular aggravating circumstance does not "convict" or "acquit" defendant).

When the entire sentencing process is considered, it is clear that, unlike in *Bullington*, a range of sentences (between three and 15 years) was available in this case. The Superior Court retained considerable discretion in setting the underlying sentence and could have dismissed either or both sentencing allegations, even after findings that the allegations were true. See California Health & Safety Code §§

---

<sup>8</sup> The question presented does assume that petitioner's sentencing proceeding had those hallmarks, but there is a substantial argument to the contrary. Even if we are wrong, the debatability of the existence of the *Bullington* hallmarks is in itself a powerful argument in favor of a bright-line rule that the Double Jeopardy Clause does not bar resentencing in noncapital cases. Absent that rule, state and federal judges will be forced to resolve whether each of the multitude of sentencing provisions that have been enacted by Congress and the fifty state legislatures has sufficient hallmarks to trigger double jeopardy protection.

11359, 11360(a), 11361(a) (West Supp. 1998); California Penal Code §§ 654(a), 1170(b), 1385(a) (West Supp. 1998); California Rules of Court 408(a), 420, 421, 423 (West 1997); *People v. Superior Court (Romero)*, 917 P.2d 628, 644 n.11, 647 (Cal. 1996); *People v. White Eagle*, 56 Cal. Rptr. 2d 749, 756 (5th Ct. App. 1996). Also absent in this case were substantive standards guiding the sentencing discretion comparable to the statutory aggravating and mitigating factors in *Bullington*. The court's discretion to dismiss the strike allegation was constrained only by the requirement that its decision be "in furtherance of justice," see *Romero*, 917 P.2d at 647, and the standards limiting its discretion in setting the base sentence were not comparable to those provided in *Bullington*. See Pet. Br. 39-40; Amicus Br. of Cal. Pub. Def. Ass'n 8-9.

2. In any event, as we have explained, the Double Jeopardy Clause does not bar resentencing merely because the government chooses to provide the criminals being sentenced with some trial-like protections. It would be a powerful disincentive to the voluntary provision of procedural safeguards at sentencing if, once a State provides a certain level of protections, it must provide every protection that the Constitution mandates for a criminal trial. Cf. *Kansas v. Hendricks*, 117 S. Ct. 2072, 2083 (1997) (that Kansas chose to provide trial-like safeguards in civil commitment proceeding did not make that proceeding criminal and subject to Double Jeopardy Clause). Such a rule would also ignore a critical component of the reasoning in *Bullington*. This Court has repeatedly recognized that *Bullington* rested not only on the presence of the hallmarks of a trial, but also on the conclusion that the principles underlying the Double Jeopardy Clause require that an

"acquittal" of a death sentence have the same finality accorded an acquittal of guilt of a substantive criminal offense. See *Rumsey*, 467 U.S. at 209; *Spaziano*, 468 U.S. at 458.

The dual nature of *Bullington*'s rationale also disposes of petitioner's contention (Pet. Br. 24-25, 42) that the Court's decision not to overrule *Stroud v. United States*, 251 U.S. 15 (1919), must mean that *Bullington* applies to noncapital sentencing. *Bullington*'s failure to overrule *Stroud* indicates only that *Bullington* does not necessarily apply to all capital sentencing. In *Stroud*, the Court held that the Double Jeopardy Clause did not bar a defendant from being sentenced to death on retrial following appeal, even though he had been sentenced only to life imprisonment in his initial sentencing proceeding. Resentencing was permissible in *Stroud* because the sentencing proceeding in that case, which preceded *Furman*, *supra*, and *Gregg*, *supra*, lacked the hallmarks of a trial on guilt or innocence. See *Bullington*, 451 U.S. at 439. Resentencing is permissible in noncapital cases, whether or not the sentencing proceedings have those hallmarks, because resentencing would neither impose anxiety and ordeal comparable to a trial on guilt of a substantive offense nor present a risk comparable to that of an erroneous conviction.

Petitioner also finds no support in the due process cases on which he relies (Pet. Br. 18-21). Those cases establish only that the protections afforded by the Due Process Clause during sentencing, see *Townsend v. Burke*, 334 U.S. 736 (1948), vary depending on the characteristics of the sentencing proceeding at issue. See *Specht v. Patterson*, 386 U.S. 605 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962); *Chewning v.*



*Cunningham*, 368 U.S. 443 (1962); *Chandler v. Fretag*, 348 U.S. 3 (1954). Those cases do not address the question whether the Double Jeopardy Clause bars resentencing.

In fact, in *Chandler* and *Chewning*, the Court held only that the petitioners were entitled to counsel at the sentencing proceedings in question. Those holdings are unremarkable because the Court later confirmed that the Sixth Amendment right to counsel applies to *all* sentencing proceedings. See *Mempa v. Rhay*, 389 U.S. 128 (1967). In *Oyler*, the Court simply explained that the right to counsel recognized in *Chandler* and *Chewning* would not be meaningful without notice of the charges and an opportunity to be heard. See *Oyler*, 368 U.S. at 452.

At the end of the *Bullington* opinion, the Court briefly adverted to *Specht*, which held that a person subject to an enhanced sentence under the Colorado Sex Offenders Act also has the right to be confronted with the witnesses against him, to cross-examine them, and to present evidence of his own. See *Bullington*, 386 U.S. at 610. *Specht*, however, did not decide any question under the Double Jeopardy Clause. The Court, moreover, has hesitated to "read too much into" *Specht*, see *McMillan*, 477 U.S. at 88-89, and has repeatedly declined to extend its reasoning to other cases. See *ibid.*; *Almendarez-Torres*, slip op. 17.

Neither *Specht* nor any other case cited by petitioner held that the noncapital sentencing proceedings at issue were entitled to all the constitutional protections afforded at trial, such as the protection against double jeopardy. See, e.g., *Hollis v. Smith*, 571 F.2d 685, 690 (2d Cir. 1978) (Friendly, J.) (*Specht* did not mandate jury determination or

proof beyond a reasonable doubt). "The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner*, 430 U.S. at 358 n.9. Indeed, petitioner acknowledges (Pet. Br. 27 n.8) that the applicability of the Double Jeopardy Clause is not necessarily coextensive with other constitutional protections. Petitioner therefore concedes (Pet. Br. 14-15), as he must, that the Double Jeopardy Clause does not bar resentencing in traditional sentencing proceedings, even though the Due Process Clause and the Sixth Amendment's right to counsel apply to those proceedings. As we have explained above, the Double Jeopardy Clause also does not bar resentencing in noncapital proceedings that have more procedural protections than traditional sentencing, including the proceeding in this case.

#### CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

SETH P. WAXMAN  
Solicitor General

JOHN C. KEENEY  
Acting Assistant Attorney  
General

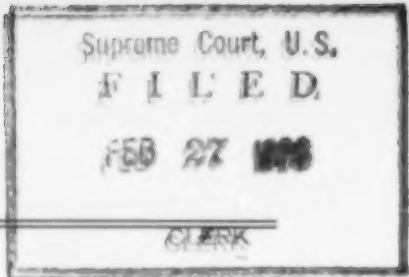
MICHAEL R. DREEBEN  
Deputy Solicitor General

MATTHEW D. ROBERTS  
Assistant to the Solicitor  
General

MARCH 1998

(11)

No. 97-6146



In The  
**Supreme Court of the United States**  
October Term, 1997

ANGEL J. MONGE,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

On Writ Of Certiorari  
To The Supreme Court Of The  
State Of California

BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS ON BEHALF OF PETITIONER

ROBERT WEISBERG  
*Counsel of Record*  
Stanford Law School  
Stanford, CA 94305  
(650) 723-0612  
*Counsel for Amicus Curiae*  
NACDL

DAVID M. PORTER  
Co-Chair NACDL  
Amicus Committee  
801 K Street,  
10th Floor  
Sacramento, CA 95814  
(916) 498-5700

25 pp



**QUESTION PRESENTED**

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have all the hallmarks of a trial on guilt or innocence?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES .....	iii
OPINION BELOW.....	1
STATEMENT OF INTEREST OF AMICUS NACDL..	1
JURISDICTIONAL STATEMENT.....	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED .....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	3
ARGUMENT .....	4
I. THERE IS NO "DEATH IS DIFFERENT" DOCTRINE BY WHICH <i>BULLINGTON</i> CAN BE LIMITED TO CAPITAL CASES.....	4
II. THE CALIFORNIA SUPREME COURT OPIN- ION MISREADS <i>BULLINGTON</i> AND THE ENTIRE CONTEXT OF THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE..	9
III. THE CALIFORNIA SUPREME COURT WRONGLY RELIES ON THE <i>CASPARI</i> DECI- SION AS STRONG SUPPORT FOR THE STATE'S POSITION IN THIS CASE.....	18
CONCLUSION .....	20

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	5
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981) .....	<i>passim</i>
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994).....	18, 19
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	7
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985).....	14
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981) .....	6
<i>Fitzpatrick v. State</i> , 638 P.2d 1002 (Mont. 1981).....	9
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	5, 7, 15
<i>Gardner v. Florida</i> , 442 U.S. 95 (1970).....	5
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980).....	5
<i>Green v. Georgia</i> , 442 U.S. 95 (1980).....	6, 7
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	7, 12, 15
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	4
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	13
<i>Patterson v. New York</i> , 432 U.S. 197 (1977) .....	13
<i>Pennsylvania v. Goldhammer</i> , 474 U.S. 28 (1985).....	14
<i>People v. Monge</i> , 16 Cal.4th 826 (1997).....	<i>passim</i>
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	13
<i>Sniadach v. Family Finance Corp.</i> , 395 U.S. 337 (1969).....	14
<i>Stroud v. United States</i> , 251 U.S. 15 (1919) .....	14, 15



## TABLE OF AUTHORITIES – Continued

	Page
<i>Teague v. Lane</i> , 489 U.S. 288 (1989) .....	18, 19
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980) ...	8, 14
<i>Witherspoon v. Illinois</i> , 391 U.S. 561 (1968) .....	6
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	4, 16
UNITED STATES CONSTITUTION	
Fifth Amendment .....	2, 5, 6, 7
Sixth Amendment .....	5, 6
Eighth Amendment .....	<i>passim</i>
Fourteenth Amendment .....	2, 5, 6
STATUTES	
California Penal Code, sections 667, 1170.2, 1192.7 ..	2, 10
OTHER AUTHORITIES	
Akhil Amar, Double Jeopardy Law Made Simple, 106 <i>Yale L.J.</i> 1807 (1997) .....	17, 18
Charles Reich, The New Property, 73 <i>Yale L.J.</i> 733 (1964) .....	13
Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 <i>Southern California L. Rev.</i> 1143 (1980) .....	4

## OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Monge*, 16 Cal.4th 826, 66 Cal. Rptr. 853, 941 P.2d 1121 (1997).

STATEMENT OF INTEREST OF AMICUS NACDL<sup>1</sup>

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 9,000 members nationwide – along with 78 state and local affiliate organizations numbering 28,000 members – including private defense lawyers, public defenders, and law professors. NACDL's mission is to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. It is also committed to preserving fairness within America's criminal justice system. NACDL has a long tradition of safeguarding the rights of all persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice.

<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief on whole or in part, and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NACDL submits this brief because of the great significance of resolving issues of double jeopardy in noncapital sentencing proceedings in the United States.

---

### JURISDICTIONAL STATEMENT

The California Supreme Court issued its opinion on August 27, 1997. Petitioner filed a petition for writ of certiorari with this Court on September 29, 1997. The Court granted the writ on January 16, 1998. This court has jurisdiction pursuant to 28 U.S.C. § 1275(a).

---

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy guarantees of the Fifth Amendment to the United States Constitution, the Due Process guarantee of the Fourteenth Amendment, and California Penal Code sections 667.1170.12, and 1192.7.

In relevant part, the Fifth Amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy . . ."

The Fourteenth Amendment provides:

Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code sections 667, 1170.12, and 1192.7 are set forth in the Appendix to Petitioner's Brief on the Merits, which is incorporated by reference herein.

---

### STATEMENT OF THE CASE

Amicus adopts and herein incorporates by reference the Statement of the Case in Petitioner's Brief on the Merits.

---

### SUMMARY OF ARGUMENT

*Bullington v. Missouri* is not limited to capital cases. It relies on principles of double jeopardy which necessarily apply to noncapital sentencing proceedings which, like the penalty phase in *Bullington*, bear the "hallmarks" of a trial on guilt or innocence. The so-called "death-is-different" doctrine is limited to a certain class of cases decided under the Eighth Amendment, and to read *Bullington* as a "death-is-different" case would lead to a widening of that "death-is-different doctrine" antithetical to this Court's well-established views on death penalty law.

The California Supreme Court decision in *Monge* requires reversal because it rests on, and thereby encourages, egregious misunderstandings of *Bullington*, of the relationship between Eighth Amendment death penalty jurisprudence and the court's more generally applicable criminal procedure doctrines, and of the relationship



between state-created statutory rights and federal constitutional rights.

### ARGUMENT

#### I. THERE IS NO "DEATH IS DIFFERENT" DOCTRINE BY WHICH *BULLINGTON* CAN BE LIMITED TO CAPITAL CASES

##### A. *Bullington* is not a case about the death penalty, nor does it rely directly on this Court's death penalty jurisprudence.

Nothing in this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) or in the post-*Furman* line of death penalty cases lends any support to the notion that *Bullington* is limited to capital cases. To be sure, "death is different" became a common "mantra" in post-*Furman*<sup>2</sup> cases and in legal scholarship,<sup>3</sup> and some scholars spoke of a supposedly new phenomenon called "Eighth Amendment due process." But in this Court's jurisprudence, death is only different in the sense that it is largely in death penalty cases that this Court has relied on the *Eighth Amendment* to require of the states special criteria or procedures to ensure equitable and reliable punishment outcomes. By contrast, in capital cases where the Court

<sup>2</sup> E.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1981) (relying on "the predicate that the penalty of death is qualitatively different" from any other sentence," quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

<sup>3</sup> E.g., Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 *Southern Cal. L. Rev.* 1143 (1980).

has found certain provisions of, say, the Fifth, Sixth, or Fourteenth Amendments applicable, the Court has not relied on the Eighth Amendment and has not in any way held or suggested that those holdings are necessarily limited to capital cases.

The post-*Furman* cases often cited for the "death is different doctrine" easily fall into either of these two categories.

*Category One:* First come those which rely expressly on the Eighth Amendment to ensure that capital trial or penalty phase procedures provide the reliability required under the Eighth Amendment to prevent arbitrary or capricious outcomes. Certain procedures or criteria are necessary to prevent the penalty trial from leading to "cruel and unusual" death sentences.

Thus, *Gardner v. Florida*, 442 U.S. 95 (1970) (per curiam) relies expressly on the Eighth Amendment in holding that *ex parte* disclosure of a presentencing report raises a concern about arbitrary and unreliable outcomes in the death sentencing process.

Further, *Beck v. Alabama*, 447 U.S. 625 (1980) holds that the Eighth Amendment may require a lesser-included offense instruction in a capital trial even where state law would otherwise normally and constitutionally preclude a lesser-included offense instruction.

Finally, *Godfrey v. Georgia*, 446 U.S. 420 (1980) imposes stringent requirements on the state to narrow and clarify its aggravating circumstances, relying on the Eighth Amendment to ensure fair and equitable outcomes in penalty trials.

*Category Two:* By contrast, other cases often (erroneously) cited for the principle that "death is different" find violations of the Fifth, Sixth, or Fourteenth Amendments in the circumstances of capital cases, but explicitly do *not* rely on the Eighth Amendment, and are logically applicable to non-capital cases as well. These cases merely discover in the unusual (not unique) form of the penalty trial an occasion for announcing rules of criminal procedure that can and must logically apply in comparable non-capital procedures as well.<sup>4</sup>

Thus, *Estelle v. Smith*, 451 U.S. 454 (1981) holds it a violation of defendant's Fifth and Sixth Amendment rights to permit a state-appointed psychiatrist to testify to statements made in a state-ordered examination when defendant had not received his *Miranda* warnings or been offered counsel before the examination. Nothing in *Smith* indicates that the decision turns on its being a capital case. The outcome would have been the same had the psychiatrist's disclosures been introduced at the guilt phase.

Further, *Green v. Georgia*, 442 U.S. 95 (1980) (per curiam) forbids a state to apply its otherwise legitimate hearsay rule to bar admission of an out-of-court inculpatory statement by a third party. This holding is solely and

---

<sup>4</sup> Of course, the pre-*Furman* case of *Witherspoon v. Illinois*, 391 U.S. 561 (1968) relied on the Sixth and Fourteenth Amendments in forbidding categorical "death-qualification" in a capital trial, but, unlike the issues in the two categories of cases discussed here, "death qualification" by definition cannot apply outside a capital case.

explicitly based on the earlier, non-capital case of *Chambers v. Mississippi*, 410 U.S. 284 (1973), applying the *Chambers* doctrine that the state hearsay law must yield to the due process clause where its application would operate "mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. at 302, quoted in *Green v. Georgia*, 442 U.S. at 97. Notably, the dissent in *Green* reaches back through *Green* to attack the underlying principle of *Chambers*, and nowhere even mentions the capital nature of the *Green* case. *Green v. Georgia*, 442 U.S. at 98 (Rehnquist, J., dissenting).

*Bullington* clearly fits into this second category of capital cases. *Bullington* accepted the Missouri state death penalty procedures as state law. It nowhere assumes that those specific procedures were constitutionally required, other than to make the obvious observation that they were a complex of procedures designed to meet the Eighth Amendment reliability standards of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). *Bullington* then became a case about general criminal procedure – about the application of the Fifth Amendment's double jeopardy clause to a criminal trial, and the key to it was therefore the observation that the Missouri penalty phase had become in effect a criminal trial. *Bullington* never mentions the Eighth Amendment and nowhere suggests that the capital nature of the potential penalty is directly relevant to the holding at all. Rather, it is the trial-type nature of the procedural structure – a structure that just happens in this area to have been designed in response to Eighth Amendment cases – that calls for application of the Double Jeopardy Clause.



This Court in 1980 had every opportunity to limit *Bullington* to death penalty cases, especially by invoking death-is-different rhetoric to distinguish the recently published case of *United States v. DiFrancesco*, 449 U.S. 117 (1980). *Bullington* nowhere invokes the "death is different" phrase, in any of its variants, nor does "death is different" appear anywhere in the Justice Blackmun's opinion. Indeed, the Court deliberately eschews any reliance on the Eighth Amendment whatsoever.

**B. Construing *Bullington* as resting on a "death is different" rationale would have troublesome consequences for constitutional law.**

Though treating *Bullington* as limited to capital cases might seem the constitutionally risk-averse course of action, it would actually have the opposite effect. If this Court now took the unprecedented step of saying that a rule of general constitutional criminal procedure that could logically apply to both capital and non-capital cases only applied in capital cases, it might be met by a host of expansive claims based on doctrines previously clearly delimited. For example, a defendant raising a Fourth Amendment claim about an allegedly illegal search or seizure, one that normally would be resolved in favor of the police in a non-capital case, might logically argue that the warrant or probable cause requirements must be higher in his or her case because it is capital. Or in regard to any of the complex post-*Miranda* cases, where the Court has made a close decision that the defendant in, say, a robbery case, was not in custody, or that the defendant waived *Miranda* rights, a capital defendant

might quite logically argue for greater *Miranda* protection.

Conversely, to read *Bullington* as limited to capital cases because "death is different" might paradoxically expand the reach of *Bullington* itself even in capital cases. That is, a defendant in a penalty phase proceeding lacking the "hallmarks of the trial on guilt or innocence," *Bullington v. Missouri*, 451 U.S. at 439, might logically argue that the Eighth Amendment requires not only highly reliable procedures and criteria, but a specific and enumerated list of trial-type procedures and criteria. *But see Fitzpatrick v. State*, 638 P.2d 1002, 1017 (Mont. 1981) (difference between Montana and Missouri penalty phase procedures allows Montana to shift burden of proof on death penalty issues from state to defendant).

**II. THE CALIFORNIA SUPREME COURT OPINION MISREADS *BULLINGTON* AND THE ENTIRE CONTEXT OF THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE.**

**A. The California Supreme Court wrongly treats the enhancement statute at issue as a mere matter of the defendant's "status."**

Close reading of the key provisions of the California statute indicates that the "serious felony" issue requires the jury or judge to engage in a combination of fact-finding and interpretation. The commission of a serious felony cannot be equated with such a mere "status," *Monge*, 16 Cal. 4th at 838, as the defendant's age or gender.

The key provision here is *Cal. Penal Code* 1192.7. That provision, by its own terms, prohibits plea bargaining in a certain category of felonies. Section 1192.7(c)(1) proceeds to enumerate these "serious" felonies. Some of the listed felonies track fairly precisely the formal definitions of substantive crimes elsewhere in the Penal Code ("mayhem," "assault with intent to rape," etc.). Other sections, notably the ones at issue here, describe a type of culpable action that may fall within a substantive criminal provision, but do not precisely coincide with any actual provision: These include subsection 1192.7(c)(8) ("any . . . felony in which the defendant personally inflicts great bodily injury on any person . . . or any felony in which the defendant personally uses a firearm") and subsection 1192.7(c)(23) ("any felony in which the defendant personally used a dangerous or deadly weapon." These subprovisions are incorporated by reference in the general enhancement statute's definition of a serious felony, see sections 667, 1170.12. As this very case demonstrates, for a judge or jury to determine whether this "strike" charge is true requires a combination of raw fact-finding and legal interpretation, not an uncontroversial, instantly determinable matter of "status" like age or gender.

This type of adjudication is therefore distinguishable from two other types to which double jeopardy may not apply: Granting for this purpose the California Supreme Court's highly questionable assumption that double jeopardy might not apply to a narrowly ministerial fact-determination of a "status," such as gender or age, or of the merely documentary question of the validity of an earlier recording of a court judgment, *Monge*, 16 Cal. 4th at 838-39, the issue relitigated in *Monge* is far different. Yet

equally different from the "strike" issue in *Monge* is the broadly normative, subjective discretion we associate with traditional sentencing, the kind of sentencing to which *Bullington*, of course, would not apply. See *infra*.

#### **B. The California Supreme Court engages in a series of non sequiturs.**

In its misunderstanding of how state-created criminal procedure can invoke federal constitutional protections, the California Supreme Court rests its holding on a number of egregiously illogical premises and assertions.

1. "Because, in a noncapital case, a state need not provide a trial of sentencing allegations *at all*, a state that elects to provide a trial of these allegations can circumscribe the boundaries of that trial." *Monge*, 16 Cal. 4th at 833 (emphasis in original).

This assertion wholly misstates and misconceives the double jeopardy issue in this case. Once the state legislature and state courts so construct a proceeding, including certain procedural guarantees, that it takes on the form of a trial, then the state is no longer constitutionally free to simply deny any procedural rights it deems inconvenient. Indeed, that is the very core holding of *Bullington*.

2. "Constitutional law, however, does not grow inevitable by accretion; rather, each question rises or falls on its individual merits." *Monge*, 16 Cal. 4th at 834.

Even aside from the hyperbole of the word "inevitably," this statement is misleading and even flatly wrong. Again, once the state's procedures pass the threshold definition of a trial-type proceeding, the "accretion" of



elements in the proceeding does indeed then entail certain procedural rights under the Constitution, and the state may in effect have "waived" the right to treat each procedural right "on its individual merits."

3. "Moreover, many of the procedural protections that apply in a section 1025 trial rest on statutory, not federal constitutional, grounds. On the other hand, many of the elaborate procedures at the penalty phase of a capital trial originate directly in the Supreme Court's decision interpreting the federal Constitution. This distinction is relevant to our analysis because, when a state legislature has elected at its option to provide a trial-like proceeding to resolve a factual issue that a judge could otherwise resolve with no hearing at all, common sense suggests that the legislature need not provide all the procedural protections that apply in a constitutionally mandated trial." *Monge*, 16 Cal. 4th at 837.

These bizarre *non sequiturs* entirely miss the point of *Bullington*, and the phrase "originate in" is especially telling by its misleading effect. No doubt some of the Missouri procedures were inspired by federal constitutional decisions under the Eighth Amendment; that is, the states sensibly read *Furman* and later *Gregg* as requiring some new sort of guided discretion scheme to ensure the reliability demanded by the Eighth Amendment. But it was the specific state-created procedural rights in *Bullington* which caused the Court to hold that double jeopardy applied there.

Equally misleading are the terms "at its option" and "constitutionally mandated trial."

A "constitutionally mandated trial" is a trial which is deemed subject to federal constitutional guarantees because the state, "at its option," has described a category of conduct in offense-type form. Consider the pairing of cases *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). In *Mullaney*, the state chose (one might say "at its option") to make malice - i.e., the absence of any provoking circumstances - an element of the crime of second-degree murder, and so the state bore the burden of proving that absence of malice beyond a reasonable doubt. The following case of *Patterson* confirmed that if the state (again, one might say, "at its option") instead chose to make provocation an affirmative defense, it could then impose a burden of proof on the defendant. The simple point, ignored or misunderstood by the California Supreme Court in this case, is that though the state is under no obligation to create certain statutory rights, once it does so and those rights cross a certain threshold, constitutional rights might then become attached to those statutory rights.

A helpful analogy can be found outside the criminal law area, in the law of property, specifically in the so-called "New Property" cases, as characterized in the classic article by Prof. Charles Reich, "The New Property," 73 *Yale L.J.* 733 (1964). In *Perry v. Sindermann*, 408 U.S. 593 (1972) the state had created a *de facto* tenure system for University employees, one it was under absolutely no obligation to establish in the first place. But once the state had created certain statutory entitlements or contractual understandings in regard to that employment, the

employment scheme became subject to federal constitutional restraints – i.e., the state could not deprive a person of that entitlement without due process. See also *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Indeed, even when the state created right is explicitly qualified by a state-created procedure for termination, this Court may recognize the underlying employment as a property right and impose federal due process clause to supersede the state termination rules. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

4. "Significantly, the high court in subsequent cases has suggested that *Bullington* does not apply to noncapital cases. For example, in *Pennsylvania v. Goldhammer*, the court reaffirmed that its decisions 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.' " *Monge*, 16 Cal.4th at 836-37, quoting *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (emphasis placed by *Monge*).

In fact, the quoted passage from *Goldhammer* is of no significance, since, as the actual text of *Goldhammer* shows, this is simply a quotation from *United States v. DiFrancesco*, *supra*, which was decided before *Bullington*.

5. "The [*Bullington*] court did not overrule *Stroud* . . . , which also involved imposition of the death penalty. Rather, it distinguished *Stroud* on the basis of the procedural safeguards that arise from modern death penalty jurisprudence. . . . Most of those procedural safeguards are unique to death penalty determinations and simply do not apply here." *Monge*, 16 Cal.4th at 837-38.

This too is a *non-sequitur*. If the Court did not overrule *Stroud v. United States*, 251 U.S. 15 (1919), and if its holding in *Bullington* is based on new federal constitutional guarantees in death penalty cases, then, by the California Supreme Court's reasoning, what part of *Stroud* would be left standing? That is, if pre-*Furman* death sentencing schemes of the sort employed in *Stroud* are now unconstitutional under *Furman* and *Gregg*, and if *Stroud* is still to some degree good law, *Stroud's* continued vitality can only be in regard to sentencing schemes which do not have the trial-type "hallmarks" present in *Bullington*, a vitality which must depend on *Bullington's* applicability beyond capital cases.

6. In its enumeration of procedural elements in the Missouri death penalty phase, the California Supreme Court inadvertently undoes its own holding. The supposedly distinguishing elements it notes in the Missouri death penalty law are either (a) present in the California enhancement law, or (b) subjective or normative issues in the Missouri death penalty law which, if anything, would *weaken* the argument for applying double jeopardy. *Monge*, 16 Cal.4th at 837. The California Supreme Court misunderstands the very premise of *Bullington* by suggesting that the "subjective" nature of the death penalty determination there was a ground for holding double jeopardy applicable. The *Monge* opinion states:

Unlike the death penalty sentencing procedure at issue in *Bullington*, a trial of prior conviction allegations under section 1025 does not require the trier of fact to determine the existence of a



broad range of aggravating and mitigating circumstances relating to the defendant's character. *Monge*, 16 Cal.4th at 837.

This is another *non-sequitur*. A broad normative review of aspects of a defendant's character would argue *against* application of the double jeopardy clause. Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here. What made the Missouri law subject to the double jeopardy clause was not the "breadth and subjectivity" of the sentencer's task, but, quite the opposite, that the "breadth and subjectivity" inherent in any death penalty scheme that was not unconstitutionally mandatory, see *Woodson v. North Carolina*, *supra*, was significantly *constrained* in the Missouri law by certain formal aggravating and mitigating criteria and trial-type procedures.

7. In treating the enhancement proceeding at issue as a minor ministerial matter, the California Supreme Court has completely misconstrued the very nature of double jeopardy law. The California Supreme Court asserts:

The trial is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; rather, it is merely a determination, for purposes of punishment, of the defendant's status, which, like age or gender, is readily determinable from the public record. *Monge*, 16 Cal.4th, at 838.

Yet the same can be said of the aggravating circumstance of prior felony convictions or other murders in any death penalty statute. Status is a meaningless concept here. The California Supreme Court also asserts:

Finally a prior conviction trial is simple and straightforward as compared to the guilt phase of a murder trial. Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. . . . This abbreviated proceeding, at which the prosecution presented only documentary evidence and defendant presented no evidence, is hardly comparable to the penalty phase of a capital trial, which was the trial-type proceeding at issue in *Bullington*. . . . Significantly, the defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities. *Monge*, 16 Cal.4th at 838.

First, this astounding statement is belied by the very facts of this case, where the documentary evidence was deemed insufficient to prove the special facts underlying the identification of a "serious felony." Second, it trivializes double jeopardy law to suggest that the key issue in double jeopardy is the length or complexity of the evidentiary phase of a trial. The key to double jeopardy is the concern for *closure* of a defendant's vulnerability to punishment after it has been properly adjudicated or determined. Perhaps the dominant contemporary scholar of constitutional criminal procedure, Professor Akhil Amar, has made this point forcefully in his important new article, "Double Jeopardy Law Made Simple," 106 *Yale L.J.* 1807 (1997). Prof. Amar stresses that double

jeopardy law, in the context of successive prosecutions, means that the prosecution gets one fair chance to convict or punish the defendant in an error-free proceeding; he stresses that jeopardy may continue until an error-free result is obtained, but the defendant is placed "twice in jeopardy" when after an error-free proceeding, that prosecution tries all over again. 106 *Yale L.J.*, at 1840-41. As Prof. Amar shows, the gravamen of double jeopardy thus has nothing necessarily to do with the specific form the second adjudication takes, but the mere fact that it is allowed to begin at all.

### III. THE CALIFORNIA SUPREME COURT WRONGLY RELIES ON THE CASPARI DECISION AS STRONG SUPPORT FOR THE STATE'S POSITION IN THIS CASE

In *Caspari v. Bohlen*, 510 U.S. 383 (1994), this Court rejected as a threshold matter, a habeas corpus claim for application of the double jeopardy clauses to a Missouri enhancement proceeding. *Caspari*, of course, relied on *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), to hold that the rule of decision argued for by the defendant in that case would be a "new rule" and hence not cognizable on habeas corpus. In so doing, the Court reviewed lower-court decisions in the area of double jeopardy and enhancement proceedings and found considerable support for the state's position in that case, though a fair amount of lower court precedent on the defendant's side as well. Under those circumstances, of course, the *Caspari* Court held that the claim was *Teague*-barred. As a *Teague* case, of course, *Caspari* did not resolve the merits of the double jeopardy issue raised by the habeas petitioner.

Yet even if some reliance on *Caspari* were warranted, the issue addressed (though not resolved) in *Caspari* was starkly different from the one now before this Court. Though *Caspari* involved a double jeopardy claim about an enhancement statute, its facts, and the state law at issue there, are significantly different from this case. In *Caspari*, the effect of finding the defendant a persistent offender was not to impose a higher sentence on him as a matter of law. Indeed, by itself, it has no substantive effect at all. Rather, a finding of persistent offender status had the important but procedural effect of shifting the power to sentence defendant from the jury to the judge. *Caspari*, 510 U.S. at 386-87. This is far different from both *Bullington* and the present case, where the finding to which the defendant argues double jeopardy should be applied directly and explicitly carries with it an extra substantive sentence. Even if discussion of a constitutional issue in a *Teague* decision can bear on a later direct appeal case, similarity between the *Teague*-barred claim and the claim in direct appeal would have to be far closer than obtains between *Caspari* and *Monge*.





### CONCLUSION

Because the California Supreme Court decision rests on egregious misconceptions of death penalty law, criminal procedure doctrine, and the relationship between state-created statutory and federal constitutional rights, the decision below requires reversal.

Respectfully submitted,

ROBERT WEISBERG  
Stanford Law School  
Stanford, CA 94305  
(650) 723-0612  
*Counsel for Amicus Curiae*  
NACDL

12  
No. 97-6146

Supreme Court, U.S.

FILED

FEB 27 1998

CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1997

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,  
Respondent.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF  
CALIFORNIA

CALIFORNIA PUBLIC DEFENDERS  
ASSOCIATION'S MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE AND BRIEF AMICUS  
CURIAE ON THE MERITS

J. BRADLEY O'CONNELL

Attorney, First District Appellate Project

JEFFREY E. THOMA

Mendocino County Public Defender

Member, California Public Defenders Association

Board of Directors and Amicus Committee

3273 Ramos Circle

Sacramento, CA 95827

(916) 362-1686

Amicus Attorneys on behalf of Petitioner

Angel J. Monge

4490



## **TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES</b>	<b>i-viii</b>
<b>INTEREST OF AMICUS</b>	<b>2-5</b>
<b>SUMMARY OF STATEMENT</b>	<b>6</b>
<b>ARGUMENT</b>	<b>6-28</b>
A. Traditional Sentencing Distinguished--California's Procedures for Discretionary Sentencing Within the Range Provided for the Underlying Crime	6-10
B. Unlike Traditional Selection Of a Term Within the Sentencing Range for the Current Crime, California's "Three Strikes" Law and other Enhancements Authorize Sentences Substantially in Excess of the Statutorily Prescribed maximum Term for the Current Offense.	10-18
C. California Enhancement, "Strikes," and Other Penalty Allegations Require Specific Jury Determinations of	

Indistinguishable From  
Traditional Findings on Elements  
of Substantive Counts

18-29

CONCLUSION

29-30



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
People v. Abarca (1991) 233 Cal.App.3d 1347	25
People v. Arbuckle (1978) 22 Cal.3d 749	8
People v. Banks (1997) 1st Dist No. A072865 (unpublished opn)	27
People v. Barre (1992) 11 Cal.App.4th 961	19
People v. Bartow (1996) 46 Cal.App.4th 1573	19, 26
People v. Best (1997) 56 Cal.App.4th 41	19, 25
People v. Bouzas (1991) 53 Cal.3d 465	14, 22
People v. Bright (1996) 12 Cal.4th 652	20
People v. Brookins (1989) 215 Cal.App.3d 1297	18
People v. Bury (1996) 50 Cal.App.4th 1873	15
People v. Combs (1986) 184 Cal.App.3d 508	8
People v. Davis (1996) 42 Cal.App.4th 806	19
People v. Dorsch (1992) 3 Cal.App.4th 1346	8
People v. Dotson (1997) 16 Cal.4th 547	15
People v. Equarte (1996) 42 Cal.3d 456	22

People v. Gamble (1996)	19
48 Cal.App.4th 576	
People v. Guerrero	25
44 Cal.3d at 355	
People v. Hernandez (1988)	20
46 Cal.3d 194	
People v. Howard (1992)	27
1 Cal.4th 1132	
People v. Jackson (1985)	23
37 Cal.3d 826	
People v. Jackson (1992)	19
7 Cal.App.4th 1357	
People v. Jackson	24
7 Cal.App.4th at 1370	
People v. Johnson (1989)	26
208 Cal.App.3d 19	
People v. Kellett (1982)	8
134 Cal.App.3d 949	
People v. Lewis (1996)	19
44 Cal.App.4th 845	
People v. Maldonado (1986)	27
186 Cal.App.3d 863	
People v. Marquez	19, 26
16 Cal.App.4th 115	
People v. Matthew (1991)	19
229 Cal. App.3d 930	
People v. Myers (1993)	24, 25
5 Cal.4th 1193, 1200	
People v. Nobleton (1995)	19
38 Cal.App.4th 76	
People v. Nguyen (1997)	15
54 Cal.App. 4 <sup>th</sup> 1873	
People v. Superior Court (Romero) (1996)	13
13 Cal.4th 497	



People v. Rayford (1994)	20
9 Cal.4th 1	
People v. Reed (1996)	25
13 Cal.4th 217	
People v. Reynolds (1991)	19, 26
232 Cal.App.3d 1528	
People v. Rhoden (1989)	18
Cal.App.3d 1242	
People v. Rodriguez	18
17 Cal.4th at 261	
People v. Superior Court (Marks) 1991	21
1 Cal.4th 56	
People v. Taylor (1979)	7
92 Cal.App.3d 831	
People v. Terry (1996)	15
47 Cal.App.4th 329	
People v. Valentine (1986)	21
42 Cal.4th 170	
People v. Weathington (1991)	14
231 Cal.App.3d 69	
People v. Williams (1996)	19, 25
50 Cal.App.3d 1405	
People v. Winslow (1995)	24
49 Cal.App.4th 680	
People v. Woodell (1998)	24
17 Cal.4th	
In re Yurko (1974)	27
10 Cal.3d 857	

#### U.S. cases

Arizona v. Rumsey	11, 17
467 U.S. at 290-212, 104 S.Ct. 2305, 81 L.Ed.2d 164	
Breed v. Jones (1975)	10, 16
421 U.S. 519, 528-531, 95 S.Ct. 1799, 44 L.Ed.2d 346	
Bullington v. Missouri	17
451 U.S. at 438-446	
Burks v. United States (1978)	21
437 U.S. 1	
Boykin v. Alabama (1969)	27
395 U.S. 238, 89 S.Ct 1709 L.Ed.2d 274	
McMillan v. a Pennsylvania (1986)	9
477 U.S. 79, 88 106 S.Ct 2411, 91 L.Ed.2d 67	
Witte v. United States (1995)	10
515 U.S. 389 115 S.Ct 2199, 132 L.Ed.2d 351	



**STATUTES****Page****Penal Code Section**

189	21
190(a)	14
209(b)	21, 22
213(a)(2)	16, 17
213(b)	17
243(d)	13
245(a)(1)	16, 23, 24
245(a)(2)	17
290(g)	19
298(d)	21
664(a)	21
666	15, 22, 23
667(a)	23
667 (a)-(i)	6, 13
667(a)(4)	16
667(d)	24
667(d)(1)	16
667(e)(1)	14
667(e)(2)	14
667(e)(2)(A)	15, 16
667.5	13
667.5(b)	16
667.5(c)	24
667.61	23
667.61(d)(1)-(4)	23
667.8	21, 22
667.9	13
667.10	13
1170.12	7, 12

1170.12(c)(1)	14, 15
1170(c)(2)(A)	14
1170.12(b)	24
1170.12(c)(2)(A)(1)	15
1192.7(c)	16, 23, 24
1192.7(c)(18)	23
1320	19
1320.5	19
12021	22, 23
12022.1	13
12022.5	13, 17
12022.5(a)(1)	17
12022.53	15, 17
12022.53(b)-(d)	13
12022.55	13
12022.6	13
12022.7	13
12022.8	13

#### **Health & Safety Code**

11361(a)	15
11370.4	13

#### **Vehicle Code**

23175	13
-------	----

#### **Revenue & Tax Code**

19701	19
-------	----



## INTEREST OF AMICUS

The California Public Defenders Association respectfully files this amicus curiae brief in support of petitioner's brief on the merits, regarding this Court's review of the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997.

Pursuant to Rule 37, the California Public Defenders Association, hereby respectfully submits, this amicus curiae brief, in support of petitioner's brief on the merits to review the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997, and in favor of this Honorable Court reversing that decision. Petitioner and respondent have both consented to the filing of this amicus curiae brief, pursuant to Rule 37.3 (copies of consent letters attached).

The California Public Defenders Association (hereafter CPDA) is the statewide association of public defenders. As such, members of this association are the primary trial and appellate counsel in the State of California for criminal defendants who are unable to afford counsel. The Association is concerned with issues affecting criminal defendants and the administration of justice throughout California, and based upon these concerns, previously filed an amicus brief with this Court on October 22, 1997, in support of the petition for writ of certiorari, prior to this Court's granting of petitioner's writ on January 16, 1998.

The instant case raises a crucial question regarding whether the Double Jeopardy Clause applies to successive non-capital sentence enhancement trials that contain all the hallmarks of a trial on guilt or innocence. The members of CPDA represent the overwhelming majority of defendants accused of crimes pending trial in this state, as well as the majority of individuals in California situated similarly to petitioner herein on appeal. Thus, CPDA has a vital and continuing interest in this issue being resolved, beyond the interest of petitioner herein.

CPDA is acutely aware of the special role which "strikes," "enhancements," and other formal penalty allegations play in California's regimen for adjudication of defendants' criminal culpability. As California's system has evolved over recent decades, the various enhancement statutes--rather than the statutes defining the underlying substantive offenses--have become the principal determinants of the degree of defendants' culpability *and of the maximum penal consequences* of their crimes. Indeed, in the 1990's, it has become quite common for enhancements or strikes to account for the majority of a defendant's total sentence, such that the portion attributable to the enhancement often dwarfs the nominal maximum statutorily authorized term for the current underlying offense. Commensurate with their importance in California's criminal justice regimen, enhancement allegations are adjudicated under the same rules as the charged substantive offenses: They are specifically alleged in the accusatory pleading, they are admitted or denied at arraignment, they are tried to a jury (or to the court, if a jury is waived), and the jury's verdict must be unanimous. During trial, the prosecution must prove each element of the enhancing allegation beyond a reasonable doubt, and all the traditional rules of evidence apply.

Prior to its decision in *People v. Monge*, 16 Cal.4th 853, 66 Cal.Rptr. 2d 853, 941 P.2d 1121 (1997), the California Supreme Court had assumed the double jeopardy clause was fully applicable to enhancing allegations, and California appellate courts had explicitly so held.<sup>1</sup> But the California Supreme Court's *Monge* opinion robs defense verdicts on enhancing allegations of the finality which attends all other forms of acquittals.

This case represents this Court's first occasion to consider any of the constitutional implications of California's regimen of

---

<sup>1</sup>See, e.g., *People v. Brookins*, 215 Cal.App.3d 1297, 264 Cal.Rptr. 240 (1989)



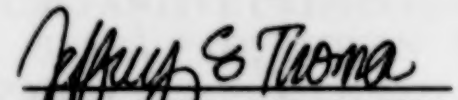
"three strikes" and other non-capital enhancing allegations. CPDA believes that it is essential that this Court understand both the procedures associated with California enhancement trials and the role which these statutes have acquired in authorizing sentences far in excess of the maximum statutory term for the underlying criminal counts. CPDA believes that, as amicus curiae, it can assist this Court by addressing how the "three strikes" statute at issue in *Monge* fits into California's larger framework of formal enhancing allegations.

Because so many clients of this organization's members are affected by any decision on this issue, CPDA believes it has a sufficient interest and good reason to present this amicus brief. The issues raised on the application of the Double Jeopardy Clause to these proceedings are more encompassing than just those presented under the facts and factors as applied to Mr. Monge, so it is believed that the brief which amicus curiae is requesting permission to file will contain a more complete argument on the constitutional issue as it applies to all defendants and appellants.

Pursuant to Rule 37.6 of the rules of this Court, amici State that no counsel for a party authored this brief in whole or in part, and that no person, other than amici and their members, made a monetary contribution to the preparation or submission of this brief.

The purpose of this brief is not to duplicate the parties' discussions of this Court's double jeopardy jurisprudence but instead to provide this Court with a comprehensive picture of how California's "strike" and enhancement procedures actually operate "on the ground." As discussed here, these allegations serve the same essential functions as traditional substantive counts, and California juries' and trial judges' adjudications of those charges are "trials" in every sense of the word.

Respectfully submitted,

  
JERADLEY O'CONNELL  
JEFFREY E. THOMA

Counsel for California Public Defenders Association  
3273 Ramos Circle  
Sacramento, CA 95827  
(916) 362-1686



## **BRIEF AMICUS CURIAE**

**DOES THE DOUBLE JEOPARDY CLAUSE APPLY TO  
NONCAPITAL SENTENCING PROCEEDINGS THAT  
HAVE ALL THE HALLMARKS OF A TRIAL ON GUILT  
OR INNOCENSE?**

### **ARGUMENT**

**CALIFORNIA "STRIKES" AND OTHER ENHANCING  
ALLEGATIONS ARE THE FUNCTIONAL EQUIVALENTS  
OF SUBSTANTIVE CRIMINAL COUNTS AND DESERVE  
THE SAME PROTECTION UNDER THE DOUBLE  
JEOPARDY**

*Monge v. California* arises under California's "three strikes" regimen. §§ 667(b)-(i), 1170.12.<sup>3</sup> Although the "three strikes" law is relatively new, it is only one of numerous examples of California's pervasive practice of utilizing formal enhancing allegations as the principal vehicles for jury adjudication of the specific degree of a defendant's criminal conduct. CPDA is aware that several other states, as well as certain federal statutes, employ a similar nomenclature of sentence "enhancements". But this semantic similarity is misleading. Unlike many of those other states, California has imbued its non-capital penalty allegations with *all* the characteristics of traditional substantive offense counts. These allegations are tried to juries under the same

---

3

The "three strikes" law consists of two substantively identical statutes--one enacted by the Legislature in March 1994, § 667(b)=(i), and duplicative statute enacted by a voter initiative in November 1994, § 1170.12. This brief will refer to "three strikes" as a single law and will not distinguish between the two statutes.

pleading and evidentiary rules as the substantive counts, require comparable findings of historical fact on defined "elements," and are subject to the same requirements of proof beyond a reasonable doubt and jury unanimity. Moreover, it is the enhancement findings, rather than the statutory sentence range for the underlying offense, which determine the defendant's maximum sentence, and the enhancement statutes commonly authorize or even compel a sentence substantially in excess of the nominal maximum term for the underlying current crime.

**A. Traditional Sentencing Distinguished—  
California's Procedures for Discretionary  
Sentencing Within the Range Provided for the  
Underlying Crime**

In California, a defendant's ultimate aggregate sentence is the result of three determinations: (1) the trial jury's (or) verdict of conviction of one of more current substantive crimes, (2) the trial (or) verdicts on any enhancing allegations, and (3) the sentencing court's discretionary weighing of aggravating and mitigating factors in making various "sentence choices" (e.g., selection of upper, middle or base term; choice between consecutive and concurrent sentencing, etc.). "Three strikes" and the other enhancing allegations discussed herein fall squarely within the second of these categories. However, as a preliminary matter, it is crucial to distinguish these formally adjudicated enhancement allegations from the third category--the more traditional sentencing factors considered in the course of the court's discretionary choices during the sentencing hearing at the time of pronouncement of judgment.

California sentencing hearings are traditional informal proceedings similar to those in most jurisdictions and have none of the formal adjudicative characteristics of California enhancement proceedings. At sentencing, the judge makes a



number of discretionary choices which fix the ultimate sentence *within the range* established by the trial jury's verdicts of conviction and enhancement findings. The principal such sentence choices include the grant or denial of probation (except where probation is statutorily barred), selection of the base term of imprisonment for the principal current conviction from among the "upper," "middle," and "lower" terms for that offense, and the choice between consecutive or concurrent sentencing where there are multiple current convictions.

The California Rules of Court <sup>4</sup> set out a number of "aggravating" and "mitigating" circumstances to guide trial judges in the exercise of these discretionary choice. See Rules of Court, rules 421, 423, 425, 428(b); see also rules 414, 413. In contract to California enhancement and "strike" statutes, which define the "elements" of enhancing allegations with the same precision as the statutes defining criminal offenses, the "mitigating" and "aggravating" factors are more loosely defined and (as discussed in petitioner Monge's brief) call upon the sentencing judge to make discretionary "normative" judgments rather than discrete findings of historical fact. Se e.g. rule 421(a)(1) ("cruelty, viciousness, or callousness"); rule 421(b)(1) ("serious danger to society"); Rules 423(b)(6) & 421(b)(5) ("satisfactory" or "Unsatisfactory" performance on probation or parole); rule 421(b)(2) ("increasing seriousness" of convictions or juvenile adjudications); rule 423(b)(1) ("insignificant" prior criminal record). Moreover, while all California crimes and punishment allegations are statutorily defined and limited, §§ 6, 13, the sentencing rules' lists of aggravating and mitigating factors are illustrative rather than exclusive. Rule 408(a); see, e.g., *People v. Taylor*, 92 Cal.App.3d 831, 155 Cal.Rptr. 62 (1979)(unadjudicated

---

4

All further reference to "Rules" are to the California Rules of Court, unless otherwise indicated.

arrests); *People v. Kellett*, 134 Cal.App.3d 949, 692, 185 Cal.Rptr. 1 (1982)(same); *People v. Combs*, 184 Cal.App.3d 508, 511, 299 Cal.Rptr. 133 (1986)(bail status).

The aggravating factors employed to deny probation, impose an upper term, or choose consecutive rather than concurrent sentencing are not subject to formal pleading and proof requirements.<sup>5</sup> They need only be established by a preponderance, Rule 420(b), and, most importantly, formal rules of evidence do not apply. The sentencing judge typically relies on extrajudicial hearsay contained in the probation or other pre-sentence report, and the defendant has no right to call and cross-examine the author of that report. See *People v. Arbuckle*, 22 Cal.3d 749, 753-756, 150 Cal.Rptr. 778, 587 P.2d 220 (1978).

In all these respects, the hearing which attends the pronouncement of judgment in California conforms to the traditional American model of sentencing, bearing none of the customary "hallmarks" of a criminal trial (pleading, rules of evidence, reasonable doubt burden, right to jury determination, etc.,). Though the sentencing judge may incidentally determine some factual matters in the course of considering aggravating and mitigating factors, the judge's principal role is the quintessentially *judicial* one of exercising discretion in the choosing between more punitive and more lenient options as to each of the "sentence choices" (choice of base term, consecutive/concurrent sentencing, etc.) contributing to the aggregate term. But all discretionary choices at sentencing simply adjust the defendant's sentence *within the range* established by the jury's or judge's trial verdicts on the conviction counts and enhancing allegations.

As described below, California's regimen of "strikes" and

---

5

See, e.g., *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 5 Cal.Rptr.2d 327 (prior convictions triggering presumption of probation ineligibility under § 1203(e)(4)).



other enhancing allegations bears no resemblance to the more traditional discretionary sentencing choices made at the time of the judgement. These enhancing allegations are part and parcel of the *trial*, involve findings of historical fact on specific statutorily-defined elements similar to those on the substantive offense counts, and authorize punishment in excess of the statutory maximum terms provided for the defendant's current offense.

**B. Unlike Traditional Selection of a Term Within the Sentencing Range for the Current Crime, California's "Three Strikes" Law and other Enhancements Authorize Sentences Substantially in Excess of the Statutorily Prescribed maximum Term for the Current Offense.**

Unlike non-capital sentencing schemes which this Court has considered in the past, California's "strikes," "enhancements" and other "penalty allegations" authorize punishment over and above the statutory maximum term specified for a defendant's current offense or offenses. In finding that the Sixth Amendment right to jury trial and the Fourteenth Amendment requirement of proof beyond a reasonable doubt did not apply to Pennsylvania's "mandatory minimum" provisions for arming during a felony, this Court emphasized repeatedly that the firearm factor did not expose a defendant "to greater or additional punishment" than statutorily prescribed for the current conviction offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 106S.Ct 2411, 91 L.Ed.2d 67(1986):<sup>6</sup>

---

6

In distinguishing California "strikes" from the "mandatory minimum" considered in *McMillan*, CPDA does not suggest that the same standards govern the constitutional rights asserted in the two cases. On the contrary,

Section 9712 *neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty*; it operates solely to limit the sentencing court's discretion in selecting a penalty *within the range available to it without the special finding of visible possession of a firearm, Id.* at 88-89, emphasis added.

The same is true of the federal sentencing guidelines. Although various aggravating factors (weapon use, prior convictions, etc.) may move the sentence selection up or down the ladder of potentially available terms for the current conviction offense, *in no event can a guidelines factor result in a term in excess of the "statutorily authorized maximum sentence" for the current crime.* U.S. Sentencing Guidelines §§ 5G1.1(a), 5G1.1(c)(1).

On that ground, this Court found no double jeopardy bar to a conviction based on criminal conduct which had previously been considered as "relevant conduct" in calculating the defendant's guidelines sentence on an earlier separate conviction. *Witte v. United States* (1995) 515 U.S.389 115 S.Ct 2199, 132 L.Ed.2d 351. Echoing its comments in *McMillan*, the Court emphasized that, in the earlier case, the separate criminal conduct had merely been "used to enhance petitioner's sentence *within the range authorized by statute*" for the underlying conviction offense" *Id.*

---

it is well established that double jeopardy protections apply in a number of proceedings in which there is no Sixth Amendment right to a jury--such as juvenile delinquency trials, *Breed v. Jones* (1975) 421 U.S. 519, 528-531,95 S.Ct. 1779, 44 L.Ed.2d 346 and, of course, capital penalty trials, *Arizona v. Rumsey*, 467 U.S. at 203,210, 104 S.Ct. 2305, 81 L.Ed.2.d 164..



at 399, emphasis added.<sup>7</sup> "The higher guidelines range [resulting from consideration of the separate conduct], however, *still falls within the scope of the legislatively authorized penalty* (5-40 years)" for the conviction offense. *Ibid.*, emphasis added. Indeed, the *Witte* majority viewed this characteristic as so significant that it repeated it in the opinion's concluding synopsis of the holding: "Because consideration of relevant conduct in determining a defendant's sentence *within the legislatively authorized punishment range* does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishment for the same offense." *Id.* At 406, emphasis added.

Sentencing provisions such as Pennsylvania's "mandatory-minimum" statute or the federal sentencing guidelines simply represent more elaborate mechanisms for weighing traditional sentencing factors, such as the aggravating and mitigating circumstances considered by California courts in choosing among lower, middle and upper terms. Cf. Rules 421, 423. That is, such provision may "dictate[] the precise weight" accorded particular sentencing considerations and may even limit sentencing discretion by raising the *minimum* permissible term for the current offense. *McMillan*, 477 U.S. at 89-90; *Witte*, 515 U.S. at 401. But they do not and cannot increase the sentence above the *maximum* statutorily authorized term for the current offense.

California penalty allegations are completely different. Though these statutes employ a variety of mechanisms for increasing defendants' sentences, their common characteristic is the authorization of a sentence in excess of the statutorily

---

7

See also *Witte*, 515 U.S. at 401, quoting *McMillan*'s description of the Pennsylvania statute as "neither alter[ing] the maximum penalty" for the current crime nor "calling for a separate penalty." *McMillan*, 477 U.S. at 87-88.

prescribed upper term for the defendant's current offense. Most California sentencing allegations take the form of "enhancements" within the state's technical definition of that term— "an additional term of imprisonment added to the base term." Rule 405(c). In other words, the enhancement consists of a fixed term of years added *on top* of the sentence for the current offense. Among the most commonly charged of these are 5-year enhancements for prior "serious felonies", § 667(a), enhancements of 9 or 15 years for kidnaping for purposes of sexual assault, § 667.8, various enhancements ranging from 3 to 10 years for firearm use, §§ 12022.5, 12022.55, "quantity enhancements" ranging from 3 to 25 years for drug offenses, Cal. Health & Saf. Code § 11370.4, and numerous lesser enhancements on such diverse factual elements as prior prison terms, age of the victim, bail or O.R. status, infliction of great bodily injury, and value of stolen property. E.G. §§ 667.5, 667.9, 667.10, 12022.1, 12022.7, 12022.8, 12022.6.<sup>8</sup>In the language of *McMillan* and *Witte*, each of these enhancements "call[s] for a separate penalty" in addition to the term for the current crime. *McMillan*, 477 U.S. at 88; *Witte*, 515 U.S. at 401.

Another set of California penalty allegations function through the other means considered and distinguished in *McMillan* and *Witte*--by "alter[ing] the maximum penalty for the crime committed." *McMillan* at 87-88; *Witte* at 515 U.S. at 401. The "three strikes" law under which Monge was tried and sentenced is a prime example. §§ 667(b)-(i); 1170.12. It applies broadly to *any* current felony trial, where the prosecution alleges

Effective January 1998, the California Legislature has increased the firearm enhancements by enacting a new "10-20-life" statute, § 12022.53. Like other enhancements, these additional penalties for firearm use are imposed "in addition to and consecutive to the punishment prescribed" for the current conviction offense. § 12022.53(b)-(d).

and proves that the defendant has one or more prior "serious" or "violent" felony convictions. *People v. Superior Court (Romero)*, 13 Cal.4th 497, 505, 529, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). The "three strikes" law establishes "alternative sentencing scheme for the current offense" which "when applicable, *takes the place of whatever law would otherwise determine the defendant's sentence for the current offense.*" *Id.*, 13 Cal.4th at 527, 524, emphasis added. Monge was tried and sentenced under the law's "second strike" provisions which authorized the sentencing court to *double* the term otherwise available for his current marijuana offense. §§ 667.(e)(1), 1170.12(c)(1). The law's "third strike" provisions go still further and require an indeterminate term of *at least* 25 years to life. § 667(e)(2)(A), 1170.12(c)(2)(A).<sup>9</sup>

Other penalty allegations which (like "three strikes") replace the current offenses's statutorily authorized sentencing range with "alternative sentencing schemes" includes California's recent "one strike" law for sex offenses, § 667.61, its various "habitual offender" statutes, e.g. § 667.7, <sup>10</sup> and its special sentencing statutes for petit theft with a prior, § 666, and attempted premeditated murder, § 664(a). In addition to increasing the length of the defendant's sentence beyond the maximum statutory term for the current offense, many of these penalty provisions fundamentally alter the *nature* of the sentence imposed.

---

9

Under the law's somewhat arcane "third strike" formula, the minimum term for the indeterminate life sentence is set as the *greater* of 24 years, triple the term otherwise provided for the current conviction, or the term resulting from other enhancements. §§ 667(e)(2)(A)(i)-(iii), 1170.12(c)(2)(A)(i)-(iii). Thus, for example, while the statutorily prescribed term for second-degree murder is 15 years to life, § 190(a), a "third strike" adjudication will escalate that sentence to 45 to life.

10

See also §§ 667.71, 667.72, 667.75.



For most felonies, California statutes authorize a triad of fixed or "determinate" terms--such as the 3-, 5- or 7-year terms prescribed for Monge's current marijuana offense. Cal. Health & Saf. Code § 11361(a). But California's "third strike" provisions (as well as various other "alternative sentencing schemes") replace these fixed sentences with various indeterminate life terms, such as 25 years to life. E.G., §§ 667(e)(2)(A), 1170.12(c)(2)(A). Under California's "habitual offender" law, a defendant may even receive a sentence of life *without possibility of parole*, § 667.7(a)(2) for a current crime (e.g., battery with serious bodily injury, § 243(d) with a statutorily authorized maximum term of only four years.

Under some California statutes, the penalty allegations are the only thing which exposes the defendant to a state prison term. For example, petit theft is a misdemeanor punishable with a *county jail* sentence "not exceeding six months," § 490, but pleading and proof of a prior theft conviction triggers felony punishment: a state prison sentence of up to three years. § 666; cf. § 18. Yet, the California Supreme Court has declared that "petit theft with a prior," § 666, represents a form of sentence enhancement, not a distinct offence. *People v. Bouzas*, 53 Cal.3d 467, 470-480, 279 Cal.Rptr. 847, 807 P.2d 706 (1991).<sup>11</sup>

Finally, it bears emphasis that California's various "enhancements" and other "penalty provisions" often operate cumulatively with one another. Thus, the finding that Monge had a prior "serious felony conviction" (or "strike") doubled the term for his current marijuana crime from five years to ten years, §§ 667(e)(1), 1170.12(c)(1), and the finding that he had served a prison term for that same prior conviction resulted in imposition

---

11

The same is true of California's provision for felony punishment (up to 3 years in state prison, § 18) for repeat drunk drivers. Cal.Veh. Code § 23175; see *People v. Weathington*, 231 Cal.App.3d 69, 86-90, 282 Cal.Rptr. 170 (1991).

of an additional 1-year enhancement, § 667.5(b), bringing Monge's total term to 11 years.

Frequently, the cumulative effect is even greater. For instance, both the five-year enhancement provisions, § 667 and the second- and third-strike punishments of that same statute are tied to § 1192.7(c)'s enumeration of "serious felonies. See §§ 667.(a)(4), 667(d)(1). Thus, a "third strike" defendant whose current crime (like his prior "strikes") is also a "serious felony" will ordinarily receive a sentence of at least 35 years to life: a "third strike" indeterminate term of 25 years to life, §§ 667(e)(2)(A)(1), 1170.12(c)(2)(A)(1), *plus five-year enhancements, § 667(a), based on the same two prior "strikes."* See *People v. Dotson* (1997) 16 Cal.4th 547, 66 Cal.Rptr.2d 423, 941 P.2d 56 (and prior cases discussed). (And, the defendant may also receive additional enhancements (e.g., weapon use) on top of that 35 years to life to term--even where his current felony conviction (e.g., assault with a deadly weapon or robbery) has a statutorily authorized maximum term of only 4 or 5 years. See e.g., §§ 245(a)(1), 213(a)(2).)<sup>12</sup>

These several examples illustrate another common feature of California sentencing. Not only do the enhancements and other penalty allegations authorize punishment in excess of the statutorily prescribed upper term for the current crime., the enhancing allegations frequently account for the bulk of the

---

12

The California courts have also approved "three strikes" terms for offenses which are ordinarily misdemeanors and only qualify for state felony treatment by virtue of "felony booster" penalty allegations such as "petty theft with a prior," § 666. See e.g., *People v. Bury*, 50 Cal.App.4th 1873, 58 Cal.Rptr.2d 682 (1996); *People v. Nguyen*, 54 Cal.App.4th 705, 63 Cal.Rptr.2d 173 (1997); *People v. Terry*, 47 Cal.App.4th 329, 54 Cal.Rptr.2d 769 (1996) (each allowing "third strike" term of 25 to life where defendant's current crime was petty theft, ordinarily a misdemeanor punishable with up to 6 months in jail).

aggregate sentence and dwarf the base terms available for the current offense.<sup>13</sup>

In evaluating the role of Pennsylvania's "mandatory minimum" statute in *McMillan* and later of the federal sentencing guidelines' "relevant conduct" provisions in *Witte*, this Court saw no indication that either sentencing factor had become "a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88; *Witte*, 515 U.S. at 403. But that is exactly what has occurred with California's various enhancements and other penalty allegations, including the "three strikes" law at issue here. The penalty allegations typically expose a defendant to much greater "jeopardy" in the lay sense of the term--a much longer potential prison term--than substantive counts themselves.<sup>14</sup>

Having assigned to its penalty allegations much of the work performed by substantive offense counts in other jurisdiction--including formal charging and jury adjudication of the factual elements which determine the maximum potential

---

13

While the examples above have principally involved "strikes" and other penalty allegations concerning prior convictions, the same is true of enhancing allegations concerning facts of the current offense. For example, the various firearm enhancements, e.g., § 12022.5, 12022.53, provide additional terms substantially longer than the base terms for most offenses commonly committed with firearms. E.g., compare § 245(a)(2) (base terms of 2, 3, 4 years for assault with a firearm) with § 12022.5(a)(1) (consecutive enhancements of 3, 4, or 10 years for personal firearm use during commission of any felony); compare § 213(a)(2) (base terms of 2, 3, or 5 years for robbery) and §§ 213(b), 17 (and of 16 months, 2 years or 3 years for attempted robbery), with § 12022.53 (consecutive enhancements of 10 years, 20 years or 25 years to life for firearm use during designated felonies, including robbery and attempted robbery). The quantity enhancements for drug offenses reveal a similar pattern. Compare Cal

14

Cf. *Breed v. Jones*, 421 U.S. 519, -531 95 S.Ct. 1779, 44 L.Ed.2d. 346 (discussing "jeopardy" concept).



sentence--California cannot withhold the double jeopardy protections which necessarily attend such an adjudication. Regardless of whether such a factual allegation is denominated a "count," an "enhancement," or a "strike," a jury's, trial judge's, or appellate court's finding of legally insufficient proof must be the final word, and the Constitution does not allow the unsuccessful prosecutor a second or third try to prove that charge.

**C. California Enhancement, "Strikes," and Other Penalty Allegations Require Specific Jury Determinations of Historical Fact Which Are Indistinguishable From Traditional Findings on Elements of Substantive Counts.**

In *Bullington* and *Rumsey*, this Court applied double jeopardy protections to capital penalty phase proceedings which had "all the hallmarks of a trial on guilt or innocence." *Bullington* v. *Missouri*, 451 U.S. at 438-446; *Arizona* v. *Rumsey*, 467 U.S. at 290-212. As the majority opinion here acknowledged, in California the trial of "strikes" or other non-capital enhancing allegations has all these same trial "hallmarks,": The prosecution must formally allege them in the accusatory pleading, they are tried to a jury and require a unanimous verdict, the prosecution's proof must be admissible under the rules of evidence just as in any other trial, the defense may offer evidence in rebuttal, and the prosecution's burden is proof beyond a reasonable doubt. See *Monge*, 16 Cal.4th at 833-834, 836 (and authorities discussed there).<sup>15</sup>

But the similarity is much deeper than the *Monge* majority acknowledges. The *Monge* majority opinion speaks of the supposed ease with which prosecutors can prove prior conviction

---

<sup>15</sup>See also *Monge* at 859, 879 (dis.opn. Of Werdegar, J.)

allegations and suggests that such trials are "simple and straightforward" affairs in which "the outcome is relatively predictable." *Monge*, 16 Cal.4th 838. Both the premise and the characterization are wrong. Preliminarily, CPDA disputes the premise that a "simple" criminal trial is any less deserving of full constitutional protections than a complex or lengthy one. Many trials of substantive offense are "straightforward" or even perfunctory, commonly involve minimal prosecution evidence and no defense evidence, and rely principally on documentary evidence (including evidence of the defendant's "status")--e.g., such crimes as failure to register as a sex offender, § 290(g), failure to appear following bail or O.R. release, § 1320, 1320.5, or failure to file a tax return, Cal. Rev. & Tax. Code §19701. Even many drug possession cases can be tried solely on the basis of the arresting officer's testimony. Although many such criminal trials are "short and relatively predictable" in the manner ascribed to enhancement trials, *Monge*, 16 Cal.4th at 839, surely no one would question the fact that *all* such trials, irrespective of length or complexity, place the defendant in "jeopardy." Contrary to the majority's implication, a "defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities," *ibid.*, in order to enjoy the protections of the double jeopardy clause.

Even leaving aside the *Monge* majority's dubious premise, the opinion's dismissive description of California "strike and enhancement trials is demonstrably wrong. The great frequency with which prior conviction findings are reversed for insufficiency of evidence, evidentiary errors, and other trial errors, belies the *Monge* majority's assurances that these are easily proven allegations with readily predictable outcomes.<sup>16</sup> Perhaps that is

---

16

See, e.g., *People v. Rodriguez*, 17 Cal.4th at 261-262; *People v. Brookins*, 215 Cal.App.3d 1297, 264 Cal. Rptr. 240 (1989); *People v. Rhoden*, 216

true of prior conviction allegations in some other jurisdictions, but not in California. On the contrary, CPDA'S experience is that prior conviction findings are reversed the insufficiency of evidence much more frequently than convictions for current substantive offenses.<sup>17</sup>

The *Monge* opinion's portrayal of California enhancement trials as qualitatively different than other trials is equally indefensible. Not only are they tried under the same rules, California enhancing allegations involve findings of historical fact almost identical to those which jurors customarily make on offense counts. Sometimes the identical factual element which distinguishes a greater offense from a lesser included offense in one context is deemed a separate enhancing allegation in a closely related context.

California's homicide-related statutes present a stark

---

Ca. App.3d 1242, 1255-1257, 265 Cal.Rptr. 355 (1989); *People v. Jackson*, 7 Cal.App.4th 1357, 1370-1373, 10 Cal.Rptr.2d 5 (1992); *People v. Matthews*, 229 Cal.App.3d 930, 280 Cal.Rptr. 134 (1991); *People v. Williams*, 50 Cal.App.4th 1405, 58 Cal.Rptr.2d 517 (1996); *People v. Lewis*, 44 Cal.App.4th 845, 52 Cal.Rptr.2d 338 (1996); *People v. Bartow*, 46 Cal.App.4th 1573, 54 Cal.Rptr.2d 482 (1996); *People v. Gamble*, 48 Cal.App.4th 576, 55 Cal.Rptr.2d 721 (1996); *People v. Williams*, 222 Cal.App.3d 911, 272 Cal.Rptr. 212 (1990); *People v. Best*, 56 Cal.App.4th 41, 64 Cal.Rptr.2d 809 (1997); *People v. Marquez*, 16 Cal.App.4th 115, 123-124, 20 Cal.Rptr.2d 365 (1992); *People v. Reynolds*, 232 Cal.App.3d 1528, 284 Cal.Rptr. 356 (1991); *People v. Davis*, 42 Cal.App.4th 806, 813-820, 49 Cal.Rptr.2d 890 (1996); see also *People v. Barre*, 11 Cal.App.4th 961, 14 Cal.Rptr.2d 307 (1992); *People v. Nobleton*, 38 Cal.App.4th 76, 84-85, 44 Cal.Rptr.2d 611 (1995).

17

The published reversals represent only the tip of the iceberg. California's appellate courts decide over 95% of criminal appeals--including both affirmances and reversals--in *unpublished opinions*. See Judicial Council of California, 1997 *Judicial Council Report on Court Statistics*, p. 29.



example. Murder is divided into two degrees: second-degree murder is considered a lesser included offense within the greater offense of first-degree murder. One of the factual elements which distinguishes the offenses is premeditation. § 189. Premeditation has an equally significant role in the adjudication of *attempted murder* charges. Attempted murder with premeditation is punishable with an indeterminate life term; otherwise, attempted murder is punishable with a determinate term of 5, 7, or 9 years. § 664(a). Yet the California Supreme Court recently held that, unlike murder, attempted murder is not divided into degrees, and there is no distinct offense of attempted premeditated murder of "attempted first-degree murder." Instead, there is a unitary offense of attempted murder, and premeditation represents a separate "penalty allegation," which (like other such allegations) is tried to the jury. If the allegation is found true, it subjects the defendant to an alternative sentencing scheme which displaces the triad of fixed "determinate" terms for the underlying offense of attempted murder. See *People v. Bright* (1996) 12 Cal.4th 652, 49 Cal.Rptr.2d 732, 909 P.2d 1354. Indeed, the California Supreme Court has expressly analogized the "three strikes" law to the premeditation allegation for attempted murder. See *People v. Superior Court (Romero)*, 13 Cal.4th at 527.<sup>18</sup>

---

18

California's "kidnaping for rape" statutes tell a similar story. § 209(b) [formerly § 298(d)] establishes a distinct offense of kidnaping for purposes of rape or other offenses. *People v. Rayford*, 9 Cal.4th 1,8-11, 36 Cal.Rptr.2d 317, 884 P.2d 1369 (1994); simple kidnaping, § 207 is a lesser included offense within the greater crime defined by § 209(b). Another statute, § 667.8, covers the identical subject and establishes penalties of 9 or 15 years (depending upon age of victim) for kidnaping for purposes of rape or other sexual offenses. But, unlike § 209(b), § 667.8 is deemed an "enhancement" which, if found true by the jury, is added to a sentence for an underlying offense of simple kidnaping (or for an underlying sexual offense). *People v. Hernandez*, 46 Cal.3d 194, 249 Cal.Rptr. 850, 757 P.2d 1013 (1988). The reasoning of the *Monge* opinion would produce the

Plainly, in a first-degree murder case tried on a premeditation theory, an appellate court's finding of legally insufficient evidence of premeditation would bar retrial of the first-degree charge, *Burks v. United States*, (1978) 437 U.S. 1, 16-19, 98 S.Ct. 2141, 57 L.Ed.2d 1 (though the appellate court would remain free to reduce the conviction to the lesser included offense of second-degree murder). But, under the reasoning of the *Monge* majority, a similar appellate finding of insufficient evidence of premeditation in an attempted murder case evidently would raise no federal jeopardy bar to retrying the premeditation allegation.<sup>19</sup>

The *Monge* majority's denial of jeopardy protection to prior conviction allegations presents an equally intolerable anomaly. Like the facts which underlie other common enhancements, prior convictions are considered "elements" of an offense in one context and penalty allegations in another. For example, until fairly recently, most California courts and practitioners assumed that *both* "felon with a firearm," §12021, *People v. Valentine* (1986) 42 Cal.4th 170, 177-181, 228 Cal.Rptr. 25, 720 P.2d 913, "petit theft with a prior," § 666, represented distinct felony offenses which included prior convictions as "element." But, in 1991, the California Supreme Court held that the latter statute, §666, represented a form of enhancement

---

*absurd--and manifestly unjust--result that a prosecutor's failure to prove the "purpose of rape" element would trigger the double jeopardy clause only if that conduct had gone to the jury as an element of the "offense" of current § 209(b), rather than as the mere "enhancement," § 667.8.*

19

The *Monge* majority suggested that the state constitution might still prevent retrial of a current conduct enhancement which jurors had found not true, but it disavowed the implication of a prior California opinion that the federal jeopardy clause applied to such enhancements. *Monge*, 16 Cal.4th at 843, discussing *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 78 fn. 22, 2 Cal.Rptr.2d 389, 820 P.2d 613.

allegation which established an alternative sentencing scheme for the underlying offense of petty theft. *People v. Bouzas*, 53 Cal.3d 465-480. Again, while a failure of proof of the prior conviction "element" of a § 12021 charge would unquestionably invoke a jeopardy bar, according to the to the *Monge* majority no such protections would attend an identical failure to prove a prior conviction enhancing allegation under § 666.

Neither is there any colorable basis for distinguishing penalty allegations concerning facts of the current offense (3.g., premeditation, weapon use) from those for prior convictions. Preliminarily, CPDA notes that California enhancement allegations cannot be neatly divided into any such discrete categories. A number of the more important penalty allegations are hybrids which require the jury or other trier of fact to make findings concerning *both* the factual details of the current crime and the factual details of the conduct underlying prior conviction. Most notably, the five-year enhancement under § 667(a) requires findings that both the current offense and the prior conviction involved criminal conduct including all the elements of a "serious felony," as defined in § 1192.7(c). See, e.g. *People v. Equarte*, 42 Cal.3d 456, 229 Cal.Rptr. 116, 722 P.2d 890 (1996)<sup>20</sup> California's "one strike" statute, § 667.61, represents another form of hybrid penalty allegation. The enhancing allegations which expose the offender to an indeterminate life sentence may consist of either a prior conviction, factual circumstances of the current crime, or some combination of the two. §§ 667.61(d)(1)-(4); see also §

Thus for instance, it would be unusual for a § 667(a) allegation to require the current jury or other trier of fact to make findings over and above the minimum statutory elements of both the current and prior conviction offenses--e.g., whether the current felony assault conviction involved actual infliction of great bodily injury rather than just force likely to cause such injury (compare §1192.7(c)(8) with § 245(a)(1)), or that the prior second-degree burglary was of an inhabited dwelling house (see § 1192.7(c)(18)).



667.61(c).

Most importantly, regardless of whether the enhancement also includes current conduct elements, "three strikes" and other prior conviction allegations often require the current jury or judge to make findings of historical fact concerning narrowly-defined elements of the criminal conduct underlying the prior conviction. To qualify as a "strike," a prior conviction must have involved conduct including all the elements of one of the "serious felonies" listed in § 1192.7(c). See § 667(d), 1170.12(b).<sup>21</sup> But, as *Monge* itself illustrates, several of the "serious felony" definitions diverge significantly from the statutes defining some of the prior offenses which are most frequently alleged as the bases for "strikes." See *People v. Jackson*, 37 Cal.3d 826, 831-832, 210 Ca.Rptr. 623, 694 P.2d 736 (1985). Thus, the prosecution's proof here of a prior felony assault conviction under § 245(a)(1) was deemed insufficient because it did not establish that the assault involved any of the types of conduct (e.g., *personal* weapon use or *personal* infliction of great bodily injury) which would qualify it as a "serious felony" and thus a "strike." *Monge*, 16 Cal.4th at 831; see also e.g. *People v. Rodriguez*, 17 Cal.4th at 261-262.<sup>22</sup>

---

21

The "three strikes" law also references § 667.5(c)'s definitions of "violent felonies," but that list is essentially a subset of § 1192.7(c)'s catalogue of "serious felonies."

22

Like assault with a deadly weapon convictions, prior burglary convictions are also a frequent source of litigation under the "serious felony" and "three strikes" statutes. Only a burglary of an "inhabited dwelling house" or other residence will satisfy the "serious felony" statute, § 1192.7(c)(18), but for many years California's burglary statutes did not cleanly distinguish residential from other burglaries. Consequently, whenever an older burglary is charged as a "serious felony" or "strike," the prosecution must go "behind the judgment" and introduce additional evidence showing the residential nature of the burglarized structure. See *People v. Guerrero*, 44

Moreover, allegations based on out-of-state priors almost inevitably require additional proof because the "least adjudicated elements" of other states' statutory definitions frequently fall short of the minimum elements of their California counterparts. See *People v. Myers*, 5 Cal.4th 1193, 22 Cal.Rptr.2d 911, 858 P.2d 301 (1993).

In all such circumstances of disparity between the elements of the prior conviction offense and those of the penalty enhancement statute, the court must instruct the jurors on the specific elements necessary to sustain the enhancing allegation--just as it instructs jurors on the elements of current offense counts. *People v. Winslow*, 40 Cal.App.4th 680, 687-688, 46 Cal.Rptr.2d 901 (1995) Indeed, the trial court may frequently discharge this duty by tailoring to the prior conviction allegation the same standard instructions describing the elements of currently charged crimes (e.g., residential burglary) or current conduct enhancements (e.g., deadly weapon use). See *id.*<sup>23</sup>

To discharge its burden, the prosecution remains free to "go behind the judgment" and offer additional evidence from the

---

Cal.3d 343, 243 Cal.Rptr. 688, 748 P.2d 1150 (1988); see, e.g., *People v. Jackson*, 7 Cal.App.4th at 1370-1372.

Comparable issues arise under California's "habitual offender" statute, § 667.7. California's robbery statute defines the offense as a taking by "force or fear," § 211 (emphasis added), but only a prior "robbery involving the use of force or a deadly weapon" will support a habitual offender finding, § 667.7(a). See *People v. Brookins*, *supra* 215 Cal.App.3d 1297.

23

Moreover, the defense may also request special instructions limiting the purposes for which jurors may consider particular items of evidence from the prior case. See *People v. Woodell*, 17 Cal.4th \_\_\_, \_\_\_, Cal.Rptr. \_\_\_, 98 Daily Journal Daily Appellate Report 1455, 1458-9; Daily Journal, February 12, 1998

"record of conviction" showing that, notwithstanding the disparity between the statutory elements of the prior offense and the requirements of the "serious felony" statute, the actual criminal conduct underlying the prior satisfied all the factual elements of the "serious felony" definition. **People v. Guerrero**, 44 Cal.3d at 355-356; **People v. Myers**, 5 Cal.4th 1200. But such additional evidence must be admissible under the ordinary rules of trial evidence--including the hearsay rule and the various statutory hearsay exceptions. **People v. Reed**, 13 Cal.4th 217, 52 Cal.Rptr.2d 106, 914 P.2d 184 (1996).<sup>24</sup> Thus, for example, transcripts from the prior case are ordinarily admissible (under the former testimony exception), **Reed**, 13 Cal.4th at 223-230, as are the defendant's own statements (under the party admission exception).<sup>25</sup> But probation reports and other materials containing third-party hearsay are not. *Id.* At 230-231.<sup>26</sup>

Even the prior transcripts are scrutinized under the same rules as ordinary trial evidence. Thus, although California's preliminary hearing procedures permit police officers to testify to hearsay accounts provided by other witnesses, a preliminary hearing transcript containing such hearsay is not admissible during the trial of an enhancing prior. **People v. Best**, *supra*, 56 Cal.App.4th 41.

As in any other trial, the defense may rebut the prosecution's evidence. Hence, where the prosecution proceeds on a preliminary hearing or other partial transcript from the prior case,

---

24

Accord **People v. Woodell**, 17 Cal.4th \_\_\_, 98 DJ DAR 1455, AT pp. 1457-9.

25

E.g., **People v. Abarca**, 233 Cal.App.3d 1347, 1350-1351, 285 Cal.Rptr. 213 (1991)

26

See also, e.g., **People v. Williams**, 222 Cal.App.3d at 915-918.



the defense may seek to introduce an entire trial transcript to bring out conflicts in the evidence concerning the factual elements necessary to sustain the enhancing allegations. *People v. Bartow, supra*, 46 Cal.App.4th 1579-1582. <sup>28</sup>

In reviewing this evidence, the jury's or trial judge's task is much the same as in any other trial which is submitted, in whole or in part, on transcripts from a prior proceeding. As in other trials where a key witness is unavailable or the parties stipulate to submission on a prior transcript, the jury or judge must still resolve conflicts in the evidence, draw inferences from circumstantial evidence, and weigh the credibility of the witnesses who testified in the prior proceeding.

The specific subjects on which jurors must make findings are also the same as the elements of many substantive counts--e.g., use of firearm or deadly weapon, infliction of great bodily injury, the residential character of the burglarized structure. Indeed, such enhancement trials sometimes even require the jurors to make *mens rea* determinations concerning the prior criminal conduct. For example, a number of states' theft, burglary, and robbery statutes require only an intent to deprive the victim temporarily of his property, while California's statutes demand an intent to permanently deprive. See, e.g., *People v. Marquez*, 16 Cal.App.4th at 122-123; see *People v. Reynolds*, 232 Cal.App.3d 1533. To sustain an enhancing allegation under those circumstances, the prosecution must introduce sufficient

Although the prosecution is limited to transcripts and other competent evidence from the prior "record of conviction," the California Supreme Court has expressly left open whether "a defendant would be entitled to call live witnesses to dispute the circumstances of the prior offense." *Reed, supra*, 16 Cal.4th at 229, emphasis added. In fact, though the issue has not been definitively resolved, CPDA is aware of instances in which a defendant has put on live testimony in a "strike" or enhancement trial. Cf., e.g., *People v. Johnson*, 208 Cal.App.3d 19, 23, 256 Cal.Rptr. 16 (1989).

transcripts or other competent evidence from the prior case to permit the jurors to determine the defendant's specific intent at the time of the prior taking.<sup>29</sup>

Similarly, occasionally is it even necessary to relitigate *mens rea* issues from a prior *murder* case, because some states' definitions of "malice aforethought" fall short of California's definition of that concept. See *People v. Maldonado*, 186 Cal.App.3d 863, 866, 230 Cal.Rptr. 925 (1986).

The California court have long recognized that prior conviction allegations have some many characteristics of traditional offense counts that a defendant's admission of a prior represents the functional equivalent of a guilty plea for purposes of *Boykin v. Alabama* 395 U.S. 238, 89 S.Ct 1709, 23 L.#d.2d 274 (1969) and requires the same advisements and waivers. See *in re Yurko* (1974) 10 Cal.3d 857, 863, 112 Cal.Rptr. 513, 519 P.2d 561; accord *People v. Howard*, 1 Cal.4th 1132, 1174-1180, 5 Cal.Rptr.2d 268, 824 P.2d 1315, cer. den., 506 U.S. 942 (1992). Just as an admission of a prior conviction allegation is a form of plea, the adjudication of a contested allegation in an evidentiary hearing before a jury or trial judge is a trial, in both name and substance. The stakes are the same, the trier of fact is the same, the nature of the required findings (weapon use, specific intent, etc.) Is the same, the rules of evidence are the same, and the burden of proof is the same. California's procedures for adjudication of "strikes" and other penalty allegations are *trials*--

---

29

For instance, in one recent unreported case, the prosecution introduced transcripts and other materials concerning three separate "third degree robbery" convictions from Oregon. The California appellate court later found sufficient evidence that the conduct underlying two of the Oregon priors satisfied all the elements of a California robbery. But the reviewing court reversed the third "serious felony" finding for insufficient evidence that the defendant had the requisite specific intent. *People v. Banks*, 1st Dist. No. A072865, unpublished opn. (Apr. 30, 1997).

just as California's statutes and cases have always described them-  
-and the outcomes of those trials deserve the same finality under  
the federal double jeopardy clause.

### **CONCLUSION**

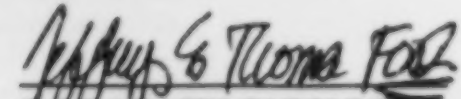
CPDA does not dispute the right of California or any other state to classify as "penalty allegations" or "enhancements" the factual elements which determine the maximum potential prison sentence. California's provision of all the traditional "hallmarks" of trial in the adjudication of those allegations subjects these proceedings to the same rigorous standards of fairness and reliability as the determination of the traditional substantive offense counts CPDA simply submits that where a state has utilized enhancements allegations to authorize punishment in excess of the statutorily prescribed maximum for the current offense, where the determination of those allegations has all the traditional "hallmarks" of trial, and where the jury or other trier of fact is called upon to make findings of historical fact comparable to those on ordinary criminal counts, the verdict in those trials must have the same constitutional finality as with the counts themselves.

The consequences of proof of a prior conviction enhancement are as great of the accused as proof of an offense count. The consequences for the prosecution of *failure of proof* must be the same as well: The double jeopardy clause must bar the state from successive attempts to retry the unproven allegation.



For all these reasons, CPDA respectfully urges this Court to reverse the judgment of the California Supreme Court and to bar the State of California from retrying the failed "strike" allegation.

February 19, 1998      Respectfully submitted,

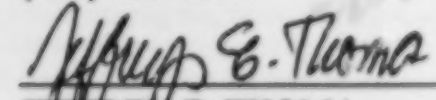


J. BRADLEY O'CONNELL

Attorney, First District Appellate Project  
730 Harrison Street, Suite 201

San Francisco, CA 94107

(415) 495-3119



JEFFREY E. THOMA

Mendocino County Public Defender  
Member, CPDA Board of Directors  
Member, CPDA Amicus Comm.

199 So. School Street

Ukiah, CA 95482

(707) 463-5433



# CPDA

A Statewide Organization of Public Defenders and Defense Counsel

California Public Defenders Association  
3373 Ramos Circle  
Sacramento, CA 95827  
Phone: (916) 362-1686  
Fax: (916) 362-3346  
e-mail: cpda@cpda.org

February 19, 1998

David S. Glassman  
Deputy Attorney General  
300 South Spring Street, #500-N  
Los Angeles, CA 90013-1230

Mr Glassman:

I am writing to you on behalf of the California Public Defenders Association, as amicus counsel in support of Angel Monge's petition for writ of certiorari in the United States Supreme Court. Pursuant to Rules 37.2, 37.3, and 37.4, I am formally requesting your permission to file an amicus brief on Mr. Monge's behalf.

It is my understanding that, based upon our previous conversation, as well as a subsequent conversation you had with Mr. Cliff Gardner, Mr. Monge's attorney, in this regard, that you will grant us your consent to file the amicus brief in this matter. I am now writing this letter to request that you write a letter in response granting us your consent in writing, and send it by fax as well as by mail. Our fax number at my office is (707) 463-5435. Although I am acting on behalf of C.P.D.A., it would be much more efficient if you could direct this letter to me at my office address:

Jeffrey E. Thoma  
Mendocino County Public Defender  
199 South School Street  
Ukiah, CA 95482

Thank you in advance to your prompt attention and response in this matter. If you have any questions in this regard, please do not hesitate to call me at my direct phone number, (707) 463-5436. I have enclosed my business card as well.

Sincerely,

*Jeffrey E. Thoma*

Jeffrey E. Thoma  
Member, CPDA Board of Directors  
Member, CPDA Amicus Committee

#### Officers

President  
Mark Arnold  
Kern County

1st Vice-President  
Hank Hall  
Los Angeles County

2nd Vice-President  
Diane Ballou  
Alameda County

Secretary/Treasurer  
Gary Windom  
Ventura County

Assistant Sec./Treasurer  
Michael Judge  
Los Angeles County

#### Board of Directors

Michael Giannini, w  
Orange County

Gerald Gloag, w  
San Joaquin County

Louis Haffner, w  
Sonoma County

Yoni T. Healy, w  
Riverside County

Fred Harro, w  
Monterey County

Barton Shoen, w  
San Diego County

Jeff Thoma, w  
Mendocino County

James Crowder, w  
Santa Barbara County

Lisa DowBerry, w  
San Francisco County

Paulino Duran, w  
Sacramento County

Carl Holmes, w  
Orange County

Loren Mandel, w  
San Diego County

Leslie McMillan, w  
Los Angeles County

Glen Meyer, w  
Santa Barbara County

Joseph Spaeth, w  
Marin County

#### Past Presidents

Richard E. Brown, 1988-89

James C. Huxley, 1989-90

Harold Portman, 1990-91

Wilbur Lutz, 1991-92

William B. Hight, 1992-93

Paul Lipka, 1993-94

Frank H. Selman, 1994-95

Robert H. Hays, 1995-96

David A. Kilday, 1996-97

Frank Williams Jr., 1997-98

John I. Cleary, 1998-99

Glen Meyer Jr., 1999-00

Paul Hays, 2000-01

Stuart Rappaport, 2001-02

Jeff Brown, 2002-03

James L. Crowder, 2003-04

David P. Bess, 2004-05

Charles James, 2005-06

Alan Kinschlag, 2006-07

Michael C. McMahon, 2007-08

Tina Gonzalez, 2008-09

Normand Volkmann, 2009-10

Margaret Smith, 2010-11

Kenneth I. Cleary, 2011-12

John McWilliams, 2012-13

**BEST AVAILABLE COPY**

DANIEL E. LUNGREN  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



300 SOUTH SPRING STREET, SUITE 3212  
LOS ANGELES, CA 90013  
(213) 897-3000

FACSIMILE: (213) 897-2263  
(213) 897-2273

February 19, 1998

Jeffrey E. Thoma  
Mendocino County Public Defender  
199 South School Street  
Ukiah, CA 95482  
Attn: California Public Defenders Ass'n

RE: Angel-Jaime Monge v. California  
USSC No. 97-6146; Our No. LA97US0006

Dear Mr. Thoma:

Respondent consents to a filing of an amicus brief in support of Petitioner by the California Public Defenders Association.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General  
of the State of California  
GEORGE WILLIAMSON,  
Chief Deputy Attorney General  
CAROL WENDELIN POLLACK,  
Senior Assistant Attorney General  
SUSAN D. MARTYNEC,  
Supervising Deputy Attorney General  
DAVID F. GLASSMAN,  
Deputy Attorney General  
*Carl N. Henry*  
CARL N. HENRY  
Deputy Attorney General  
Counsel of Record

cc: Cliff Gardner, Esq.  
Gardner & Derham  
900 North Point  
San Francisco, CA 94109

Counsel for Petitioner  
Angel Jaime Monge





# CPDA

A Statewide Organization of Public Defenders and Defense Counsel

California Public Defenders Association  
3273 Ramos Circle  
Sacramento, CA 95827  
Phone: (916) 362-1886  
Fax: (916) 362-3366  
e-mail: cpda@cpda.org

February 19, 1998

Cliff Gardner  
Gardner & Derham  
900 North Point, Ste # 450  
San Francisco, CA

Mr Gardner:

I am writing to you on behalf of the California Public Defenders Association, as amicus counsel in support of Angel Monge's petition for writ of certiorari in the United States Supreme Court. Pursuant to Rules 37.2, 37.3, and 37.4, I am formally requesting your permission to file an amicus brief on Mr. Monge's behalf.

It is my understanding that, based upon our previous conversation, as well as your previous consent when I requested consent to file our motion for leave to file the amicus brief in support of your petition for writ of certiorari, that you will consent to our filing an amicus brief herein.

I am now writing this letter to request that you write a letter in response granting us your consent in writing, and send it by fax as well as by mail. Our fax number at my office is (707) 463-5435. Although I am acting on behalf of C.P.D.A., it would be much more efficient if you could direct this letter to me at my office address:

Jeffrey E. Thoma  
Mendocino County Public Defender  
199 South School Street  
Ukiah, CA 95482

Thank you in advance to your prompt attention and response in this matter. If you have any questions in this regard, please do not hesitate to call me at my direct phone number, (707) 463-5436.

Sincerely,

*Jeffrey E. Thoma*  
Jeffrey E. Thoma  
Member, CPDA Board of Directors  
Member, CPDA Amicus Committee

#### Officers

President  
Mark Arnold  
Kern County

1st Vice-President  
Hank Hall  
Los Angeles County

2nd Vice-President  
Diane Bellas  
Alameda County

Secretary/Treasurer  
Gary Windom  
Ventura County

Assistant Sec./Treasurer  
Michael Padgett  
Los Angeles County

Board of Directors  
Michael Giannini, w  
Orange County

Gerald Gleason, w  
San Joaquin County

Louis Haffner, w  
Sonoma County

Toni T. Healy, w  
Riverside County

Fred Herro, w  
Monterey County

Barton Shaeja, w  
San Diego County

Jeff Thoma, w  
Mendocino County

James Crowder, w  
Santa Barbara County

Lisa Dewberry, w  
San Francisco County

Paulino Duran, w  
Sacramento County

Carl Holmga, w  
Orange County

Loren Mandel, w  
San Diego County

Leslie McMillan, w  
Los Angeles County

Glen Mowrer, w  
Santa Barbara County

Joseph Spaeth, w  
Marin County

#### Past Presidents

Richard E. Brown, 1966-68  
James C. Hendry, 1968-70  
Sheldon Forman, 1970-72  
Wilbur Littlefield, 1972-74  
William R. Hughes, 1974-76  
Paul Legido, 1976-78  
Pete N. Salazar, 1978-80  
Robert Harris, 1980-82  
David A. Elders, 1982-84  
Frank Williams Jr., 1984-86  
John I. Cleary, 1986-88  
Glen Mowrer Jr., 1988-90  
Fred Harris, 1990-92  
Sharon Rappaport, 1992-94  
Jeff Brown, 1994-96  
James L. Crowder, 1996-98  
Loren P. Ross, 1998-00  
Charles James, 1980-82  
Allan Kleinfeld, 1982-84  
Michael C. McKelton, 1984-86  
Tim Gonzales, 1986-88  
Normand Vidrine, 1988-90  
Margaret Smith, 1990-92

**GARDNER & DERHAM**

ATTORNEYS AT LAW  
GHIRARDELLI SQUARE  
900 NORTH POINT, SUITE 220  
SAN FRANCISCO, CA 94109  
TEL: (415) 922-9404  
FAX: (415) 922-4310

February 19, 1998

BY FACSIMILE

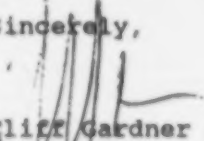
Jeffrey E. Thoma  
Mendocino County Public Defender  
199 South School Street  
Ukiah, CA 95482

Re: Monge v. California, No. 97-6146

Dear Mr. Thoma:

Pursuant to Rule 37.3 of the Rule of the Supreme Court of the United States, I hereby consent to have the California Public Defender's Association file an amicus brief on petitioner's behalf in the above captioned case.

Sincerely,

  
Cliff Gardner  
for GARDNER & DERHAM

3

Supreme Court U.S.  
FILED  
MAR 27 1998  
CLERK

No. 97-6146

In the

Supreme Court of the United States

October Term, 1997

ANGEL JAIME MONKE

*Petitioner*

STATE OF CALIFORNIA

*Respondent*

On Writ of Certiorari To the  
Supreme Court of the State of California

BRIEF OF THE STATES OF MASSACHUSETTS,  
ARIZONA, ARKANSAS, COLORADO, CONNECTICUT,  
DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS,  
INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND,  
MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA,  
NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY,  
NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO,  
OKLAHOMA, OREGON, PENNSYLVANIA, RHODE  
ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,  
UTAH, VERMONT, VIRGINIA, WEST  
VIRGINIA, AND WYOMING AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT

SCOTT HARRINGTON  
Attorney General of Massachusetts  
ELYN H. LARSEN  
Assistant Attorney General  
One Ashburton Place  
Boston, MA 02108  
(617) 727-2200

De Counsel  
National Association of  
Attorneys General  
750 First St., N.E., Suite 1100  
Washington, D.C. 20002

\* Counsel of Record  
(additional counsel listed on inside cover)

BEST AVAILABLE COPY



BRUCE M. BOVELLO  
Attorney General of Alaska  
P.O. Box 110300  
Diamond Courthouse  
Juneau, AK 99811-0300

WINSTON BRYANT  
Attorney General of Arkansas  
200 Tower Building  
323 Center Street  
Little Rock, AR 72201-2610

GALE A. NORTON  
Attorney General of Colorado  
1525 Sherman Street  
Denver, CO 80203

RICHARD BRAMMENTHAL  
Attorney General of Connecticut  
55 Elm Street  
Hartford, CT 06141-0120

M. JANE BRADY  
Attorney General of Delaware  
Carvel State Office Building  
120 North French Street  
Wilmington, DE 19801

ROBERT A. BUTTERWORTH  
Attorney General of Florida  
The Capitol  
PL 01  
Tallahassee, FL 32399-1050

DAVID B. BAKER  
Attorney General of Georgia  
40 Capitol Square, S.W.  
Atlanta, GA 30234-1300

ALAN G. LANCE  
Attorney General of Idaho  
Statehouse  
Boise, ID 83720-1000

JOE RYAN  
Attorney General of Illinois  
James R. Thompson Center  
1000 West Randolph Street  
Chicago, IL 60601

ROBERT A. MCDONNELL  
Attorney General of Indiana  
Indiana Government  
Center South  
Fifth Floor  
402 West Washington Street  
Indianapolis, IN 46204

TIM MILLER  
Attorney General of Iowa  
Hoover State Office Building  
Des Moines, IA 50319

CARLA J. STOWALL  
Attorney General of Kansas  
Judicial Building  
301 West Tenth Street  
Topeka, KS 66612-1597

RICHARD P. BYRNE  
Attorney General of Louisiana  
Department of Justice  
P.O. Box 90055  
Baton Rouge, LA 70804-0055

J. JOSEPH O'BRIEN JR.  
Attorney General of Maryland  
300 East Paul Place  
Baltimore, MD 21202-2202

HAROLD E. RUMWORTH III  
Attorney General of Minnesota  
State Capitol  
Suite 100  
St. Paul, MN 55155

MICHAEL J. COOK  
Attorney General of Mississippi  
Department of Justice  
P.O. Box 220  
Jackson, MS 39205-0220

STEPHEN W. (JAY) NEIDER  
Attorney General of Missouri  
Supreme Court Building  
307 West High Street  
Jefferson City, MO 64108

JOSEPH P. MAZUREK  
Attorney General of Montana  
Justice Building  
215 North Sanders  
Helena, MT 59620-1401

DON STENBERG  
Attorney General of Nebraska  
State Capitol  
P.O. Box 98920  
Lincoln, NE 68509-8920

FRANKIE SUE DEL PAPA  
Attorney General of Nevada  
Old Supreme Court Building  
100 North Carson Street  
Carson City, NV 89701

PETER VERNIERO  
Attorney General of New Jersey  
Richard J. Hughes  
Justice Complex  
25 Market Street  
CN 080  
Trenton, NJ 08625

DENNIS C. VACCO  
Attorney General of New York  
Department of Law  
The Capitol  
Albany, NY 12224

MICHAEL F. EASLEY  
Attorney General  
of North Carolina  
Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

HEIDI HEITKAMP  
Attorney General  
of North Dakota  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505-0040

BETTY D. MONTGOMERY  
Attorney General of Ohio  
30 East Broad Street  
Columbus, OH 43266-0410

W. A. DREW EDMONDSON  
Attorney General of Oklahoma  
State Capitol, Room 112  
2300 North Lincoln Boulevard  
Oklahoma City, OK 73105

HARDY MYERS  
Attorney General of Oregon  
Justice Building  
1162 Court Street NE  
Salem, OR 97310

MIKE FISHER  
Attorney General  
of Pennsylvania  
Strawberry Square  
Harrisburg, PA 17120

JEFFREY B. PINE  
Attorney General  
of Rhode Island  
150 South Main Street  
Providence, RI 02903

CHARLIE CONDON  
Attorney General  
of South Carolina  
Rembert C. Dennis  
Office Building  
P.O. Box 11549  
Columbia, SC 29211-1549

MARK BARNETT  
Attorney General  
of South Dakota  
500 East Capitol  
Pierre, SD 57501-5070

JOHN KNOX WALKUP  
Attorney General of Tennessee  
500 Charlotte Avenue  
Nashville, TN 37243

DAN MORALES  
Attorney General of Texas  
Capitol Station  
P.O. Box 12548  
Austin, TX 78711-2548

WILLIAM H. SORRELL  
Attorney General of Vermont  
109 State Street  
Montpelier, VT 05609-1001

Mark L. Earley  
Attorney General of Virginia  
900 East Main Street  
Richmond, VA 23219

DARRELL V. MCGRAW JR.  
Attorney General  
of West Virginia  
State Capitol  
Charleston, WV 25305

WILLIAM U. HILL  
Attorney General of Wyoming  
State Capitol Building  
Cheyenne, WY 82002

## QUESTION PRESENTED

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?



## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .....	iii
INTEREST OF THE AMICI CURIAE .....	2
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
I. THE DOUBLE JEOPARDY CLAUSE DOES NOT APPLY TO NONCAPITAL SENTENCE ENHANCEMENT PROCEEDINGS BECAUSE THEY DO NOT PLACE A DEFENDANT IN JEOPARDY FOR "AN OFFENSE" AND REJECTION OF A PRIOR CONVICTION ALLEGATION IS NOT AN "ACQUITTAL" .....	7
A. SENTENCE ENHANCEMENT PROCEEDINGS DO NOT PLACE A DEFENDANT IN JEOPARDY FOR "AN OFFENSE" .....	7
B. REJECTION OF A PRIOR CONVICTION ALLEGATION IS NOT "AN ACQUITTAL" ...	11
II. IF THE DOUBLE JEOPARDY CLAUSE IS TO APPLY TO SENTENCING AT ALL, IT SHOULD BE LIMITED TO CAPITAL SENTENCING SCHEMES .....	15
A. <i>BULLINGTON</i> WAS BASED, IN LARGE PART, UPON ITS CAPITAL CONTEXT .....	16

B.	THE VALUES UNDERLYING THE DOUBLE JEOPARDY CLAUSE ARE NOT UNDERMINED BY READJUDICATION OF A PRIOR CONVICTION ALLEGATION .....	19
C.	THE PETITIONER'S "HALLMARKS TEST" IS AN ILLOGICAL APPLICATION OF <i>BULLINGTON</i> WHICH ELEVATES FORM OVER SUBSTANCE .....	23
III.	A "HALLMARKS TEST" WOULD PRODUCE UNPREDICTABLE AND INCONSISTENT RESULTS, PENALIZE STATES FOR PROVIDING PROCEDURAL SAFEGUARDS AT SENTENCING, AND DISCOURAGE STATES FROM DOING SO IN THE FUTURE .....	25
	CONCLUSION .....	29

## TABLE OF AUTHORITIES

	Page
CASES:	
<i>Almendarez-Torres v. United States</i> , __U.S.__ (1998) .....	7
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984) .....	2, 16
<i>Baldasar v. Illinois</i> , 446 U.S. 222 (1980) .....	8
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983) .....	18
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981) .....	<i>passim</i>
<i>Burks v. United States</i> , 437 U.S. 1 (1978) .....	11
<i>Carpenter v. Chappleau</i> , 72 F.3d 1269 (6th Cir.), <i>cert. denied</i> , 117 S.Ct. 108 (1996) .....	14
<i>Caspari v. Bohlen</i> , 510 U.S. 383 (1994) .....	8, 16, 17, 22
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973) .....	5
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972) .....	17, 18
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963) .....	23

<i>Graham v. West Virginia</i> , 224 U.S. 616 (1912) .....	7
<i>Green v. United States</i> , 355 U.S. 184 (1957) .....	7, 11, 20
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	18
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	23
<i>Linam v. Griffin</i> , 685 F.2d 369 (10th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1211 (1983) .....	9, 10
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) .....	15, 19
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986) .....	7, 8
<i>Montgomery v. Bordenkircher</i> , 620 F.2d 127 (6th Cir.), <i>cert. denied</i> , 449 U.S. 857 (1980) .....	14
<i>Nichols v. United States</i> , 511 U.S. 738 (1994) .....	8
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969) .....	5, 7
<i>Parke v. Raley</i> , 506 U.S. 20 (1992) .....	7
<i>Pennsylvania v. Goldhammer</i> , 474 U.S. 28 (1985) .....	16

<i>People v. Levin</i> , 157 Ill. 2d 138, 623 N.E.2d 317 (1993), <i>cert. denied</i> , 513 U.S. 826 (1994) .....	26
<i>People v. Sailor</i> , 65 N.Y.2d 224, 480 N.E.2d 701, <i>cert. denied</i> , 474 U.S. 982 (1985) .....	9, 14
<i>Poland v. Arizona</i> , 476 U.S. 147 (1986) .....	9, 12, 16
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995) .....	24, 27, 28
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	18
<i>Stroud v. United States</i> , 251 U.S. 15 (1919) .....	5
<i>Tibbs v. Florida</i> , 457 U.S. 31 (1982) .....	11, 27
<i>United States v. Ball</i> , 163 U.S. 662 (1896) .....	11
<i>United States v. DiFrancesco</i> , 449 U.S. 117 (1980) .....	<i>passim</i>
<i>United States v. Tateo</i> , 377 U.S. 463 (1964) .....	11
<i>Williams v. New York</i> , 337 U.S. 241 (1949) .....	15



## CONSTITUTIONAL PROVISIONS:

Eighth Amendment .....	18
Fifth Amendment .....	2

## STATUTES:

42 Pa. Cons. Stat. § 9714(D) .....	26
Alaska Stat. § 12.55.125(l) .....	25
Ariz. Rev. Stat. § 13-604 .....	25
Conn. Gen. Stat. § 53a-40 .....	25
Del. Code Ann. tit. 11, § 4214, § 4215 .....	25
Fla. Stat. § 775.084(3)(a)(4) .....	26
Haw. Rev. Stat. § 706-661, § 706-662, § 706-606.5 .....	25
Ind. Code § 35-50-2-8 .....	25, 26
Iowa Code § 902.8 .....	25
Ky. Rev. Stat. § 532.080 .....	25
La. Rev. Stat. 15:529.1 .....	25, 26
Mass. Gen. L. ch. 278, § 11A .....	26
Mass. Gen. L. ch. 279, § 25 .....	25
Mo. Rev. Stat. § 558.016 .....	25

N.D. Cent. Code § 12.1-32-09(4) .....	26
N.Y. Penal Laws § 70.04, § 70.06, § 70.08, § 70.10 .....	25
Neb. Rev. Stat. § 29-2221 .....	25
Nev. Rev. Stat. § 207.010 .....	25
Okla. Stat. tit. 21, § 51 .....	25
S.D. Codified Laws § 22-7-7 .....	25
Utah Code § 76-3-203.5(4)(c) .....	26
Wyo. Stat. § 6-10-201, § 6-10-203 .....	25

## OTHER MATERIALS:

M. Frankel, Criminal Sentences: Law Without Order (1973) .....	28
Donna Lyons, "Three Strikes" Legislation Update, NAT'L CONF. ST. LEGIS., Dec. 1995 .....	25
John Clark, et al., "Three Strikes and You're Out": A Review of State Legislation, NAT'L INST. JUST. RES. IN BRIEF, Sept. 1997 .....	25

No. 97-6146

◆  
In the

**Supreme Court of the United States**

October Term, 1997  
◆

ANGEL JAIME MONGE,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

◆  
On Writ of Certiorari To the  
Supreme Court of the State of California  
◆

◆  
BRIEF OF THE STATES OF MASSACHUSETTS,  
ALASKA, ARKANSAS, COLORADO, CONNECTICUT,  
DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS,  
INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND,  
MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA,  
NEBRASKA, NEVADA, NEW JERSEY, NEW YORK,  
NORTH CAROLINA, NORTH DAKOTA, OHIO,  
OKLAHOMA, OREGON, PENNSYLVANIA, RHODE  
ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,  
TENNESSEE, TEXAS, VERMONT, VIRGINIA, WEST  
VIRGINIA AND WYOMING AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT  
◆

## INTEREST OF THE AMICI CURIAE

The Commonwealth of Massachusetts and 37 other *amici* States submit this brief in support of the respondent. Each of the *amici* States has at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense. In enacting these sentence enhancement provisions, the *amici* have sought to strike a balance between their interest in punishing crime and recidivism and their interest in providing procedural safeguards for defendants facing enhanced sentences due to their recidivism. This case directly affects both interests. If the decision below is reversed, *amici* will lose the right to apply their sentence enhancement statutes in many cases, and will be penalized for instituting procedures their legislatures believe will achieve greater fairness in sentencing.

## SUMMARY OF ARGUMENT

Until this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), it had consistently held that the Double Jeopardy Clause of the Fifth Amendment does not pertain to sentencing proceedings, except to bar imposition of multiple punishment for a single offense. *Bullington* departed from that long-standing rule, holding that the Double Jeopardy Clause prohibited a state from seeking the death penalty at retrial of a defendant "after an initial conviction, set aside on appeal, ha[d] resulted in rejection of the death sentence." *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984) (citing *Bullington*, 451 U.S. at 430). Relying upon the Court's recognition in *Bullington* that the capital sentencing hearing had "hallmarks of the trial on guilt or innocence," 451 U.S. at 439, the petitioner contends that application of the Double Jeopardy Clause to noncapital sentence enhancement proceedings turns upon the presence or

absence of such "hallmarks." Thus, petitioner argues that where noncapital sentence enhancement proceedings have such "hallmarks," the Double Jeopardy Clause permits the government only one opportunity to prove a defendant's prior convictions for the purpose of enhancement. The petitioner is wrong for several reasons.

1. The protection afforded by the Double Jeopardy Clause is against multiple punishment or prosecution for the same "offense." Sentence enhancement proceedings do not place the defendant in jeopardy for "an offense." Such proceedings neither create a separate offense nor punish a defendant for prior convictions. Rather, they simply ascertain the defendant's prior conviction status, to determine whether he is eligible to receive a more severe sentence for his current conviction.

Furthermore, the Double Jeopardy Clause does not bar rehearing of a prior conviction allegation because a factfinder's rejection of such an allegation is not "an acquittal." This Court has made clear that it is only upon acquittal, or a determination tantamount to acquittal, that the Double Jeopardy Clause precludes a second hearing of allegations made against a defendant. Accordingly, the Court in *Bullington* analogized the jury's decision to impose a sentence of life imprisonment to "an acquittal of the death sentence." Because the pronouncement of sentence in noncapital sentencing proceedings has never been equated with a "conviction" or "acquittal" of sentence, and because such an analogy is particularly inapt to describe the sentence imposed following noncapital sentence enhancement proceedings, the Court should decline to extend the analogy used in *Bullington* to noncapital sentence enhancement proceedings.



2. If the Double Jeopardy Clause is to apply to sentencing at all, its application should be limited to capital sentencing schemes. The Court's recognition in *Bullington* that the proceeding at issue contained many of the features traditionally associated with a trial on guilt or innocence was not dispositive of the case. Rather, the Court examined the values underlying the Double Jeopardy Clause and found them to be equally applicable in the unique context of the capital sentencing hearing. Because they are not equally applicable to determinations of prior conviction status made for the purpose of sentencing, double jeopardy should not apply to those determinations.

In addition, the petitioner proposes an illogical application of *Bullington* which elevates form over substance. There is nothing in the mere presence or absence of certain procedural protections which suggests that double jeopardy protections must apply as well. Double jeopardy protection flows not from the form of a criminal trial, but from the values underlying the Double Jeopardy Clause. The petitioner's position relies upon the opposite conclusion, however, making a defendant's constitutional protection turn upon the form of a hearing, rather than upon the substance of the matter adjudicated there.

3. The "hallmarks" test proposed by petitioner would produce unpredictable and inconsistent results. Most, if not all, of the 50 states have at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense, each of which has its own combination of applicable "hallmarks." Thus, the test posed by petitioner would require examination of each such state law to determine how many hallmarks apply, and how many are

enough to trigger the application of the Double Jeopardy Clause. Because it is unclear, however, how many "hallmarks" will bring a sentencing scheme within the ambit of the Double Jeopardy Clause, or what will be the standard measure of a "trial on guilt or innocence," petitioner's rule would yield inconsistent results in both the state and lower federal courts.

Finally, the rule advocated by petitioner effectively penalizes states for implementing procedural safeguards at sentencing and attempting to check the discretion of sentencing courts. In so doing, such a rule would act to the long-term disadvantage of defendants by prompting states to reconsider the safeguards they have chosen to provide defendants, and discouraging them from so providing in the future.

## ARGUMENT

In *Stroud v. United States*, 251 U.S. 15, 18 (1919), this Court unanimously held that the Double Jeopardy Clause of the Fifth Amendment did not bar the imposition of the death penalty upon reconviction of a defendant whose initial conviction, set aside on appeal, had resulted in a sentence of life imprisonment. The Court adhered to this general principle for more than sixty years, repeatedly reaffirming that the Double Jeopardy Clause does not pertain to sentencing, except to bar imposition of multiple punishment for a single offense. See *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969) ("[A]t least since 1919, when *Stroud v. United States*, 251 U.S. 15 was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction."); *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)

("The possibility of a higher sentence on retrial [i]s recognized and accepted as a legitimate concomitant of the retrial process."); *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980) ("the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase").

The Court chose to depart from this long-standing rule in *Bullington v. Missouri*, 451 U.S. at 430. Noting that the capital sentencing hearing examined in *Bullington* was, in all relevant respects, a "trial on the issue of punishment," *id.* at 438, the Court likened the jury's imposition of a sentence of life imprisonment to the government's failure to prove the appropriateness of the death penalty. Thus, the Court concluded that in the event the defendant obtained reversal of his conviction and was retried and reconvicted, the Double Jeopardy Clause precluded the imposition of the death penalty. *Id.* at 444, 446. The petitioner, apparently relying upon the Court's recognition in *Bullington* that Missouri's capital sentencing scheme contained "hallmarks of the trial on guilt or innocence," *id.* at 439, now proposes a rule under which application of the Double Jeopardy Clause to noncapital sentence enhancement proceedings would depend upon the presence or absence of such "hallmarks." There is nothing in either history or logic, however, which compels, or even counsels, application of such a "hallmarks" test to noncapital sentencing proceedings. To the contrary, application of such a test is unwarranted as a matter of both law and policy.

**I. THE DOUBLE JEOPARDY CLAUSE DOES NOT APPLY TO NONCAPITAL SENTENCE ENHANCEMENT PROCEEDINGS BECAUSE THEY DO NOT PLACE A DEFENDANT IN JEOPARDY FOR "AN OFFENSE" AND REJECTION OF A PRIOR CONVICTION ALLEGATION IS NOT AN "ACQUITTAL"**

**A. SENTENCE ENHANCEMENT PROCEEDINGS DO NOT PLACE A DEFENDANT IN JEOPARDY FOR "AN OFFENSE"**

By its terms, the Double Jeopardy Clause provides that no person shall "be subject for the same *offence* to be twice put in jeopardy of life or limb." U.S. Const. amend. V (emphasis added). This Court has interpreted these words to afford protection against multiple punishment for the same offense, and against successive prosecution for the same offense. *See North Carolina v. Pearce*, 395 U.S. at 717; *Green v. United States*, 355 U.S. 184, 187 (1957). Because the adjudication of a prior conviction allegation, made for the purpose of possible sentence enhancement, does not place a defendant in jeopardy for "an offense," the Double Jeopardy Clause does not apply to such proceedings.

This Court has long recognized that "a charge under a recidivism statute does not state a separate offense, but goes to punishment only." *Parke v. Raley*, 506 U.S. 20, 27 (1992). *See Graham v. West Virginia*, 224 U.S. 616, 624 (1912); *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (enhanced sentencing statute did "no[t] create[] a separate offense calling for a separate penalty, [but] operate[d] solely to limit the sentencing court's discretion in selecting a penalty"); *see also Almendarez-*

*Torres v. United States*, \_\_ U.S. \_\_, \_\_ (1998) (slip op., at 2, 5) (observing that recidivism "is as typical a sentencing factor as one might imagine" and concluding that provision authorizing enhanced punishment for recidivism "is a penalty provision, which . . . does not define a separate crime.").

It is clear that a defendant sentenced under an enhancement scheme is not independently tried or sentenced simply for having prior convictions, or punished for the determination of his recidivist status as such. Rather, the defendant is given a more severe sentence for an underlying crime for which he has already been tried and convicted. See *Nichols v. United States*, 511 U.S. 738, 747 (1994) ("repeat-offender laws . . . penaliz[e] only the last offense committed by the defendant.") (quoting *Baldasar v. Illinois*, 446 U.S. 222, 232 (1980) (Powell, J., dissenting)). Toward that end, sentence enhancement proceedings merely seek to define the defendant's prior conviction status, to permit the court to select an appropriate penalty for the current conviction. See *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (characterizing the matter adjudicated at sentence enhancement proceedings as a determination of "[p]ersistent-offender status").

The nature of the allegation adjudicated in sentence enhancement proceedings is not altered by the fact that the proceedings may share certain features of a traditional trial on guilt or innocence. See *McMillan v. Pennsylvania*, 477 U.S. at 89-90 (state's "dictat[ing] the precise weight to be given [sentencing] factor . . . [did] not transform [ ] . . . [that] factor into an 'element' of some hypothetical 'offense.'" ) Whether the state sentencing scheme requires the state to prove the existence of a defendant's prior convictions by a preponderance of the evidence or beyond a reasonable doubt, or requires

notice to a defendant and the application of the rules of evidence, a hearing to ascertain the existence of prior convictions is simply that, and cannot be called "the trial of an offense."

By contrast, the adjudication of guilt or innocence is clearly the classic trial of "an offense." Even the allegation adjudicated in the capital sentencing scheme at issue in *Bullington*, although not the prototypical trial of "an offense," can be characterized as a determination whether the defendant had committed an offense deserving of death. See *Poland v. Arizona*, 476 U.S. 147, 160 (1986) (Marshall, J., dissenting) ("the 'offense' for which the defendant receives his 'conviction' or 'acquittal' is that of the appropriateness of the death penalty").<sup>1</sup>

Moreover, the imposition of the death penalty is arguably part of the substantive offense of capital murder. The capital sentencing scheme not only permits, but requires, consideration of the facts underlying the murder conviction – in other words, the facts bearing on guilt or innocence. The aggravating and mitigating evidence presented to the jury relates to the same offense for which the defendant is being sentenced, and, if certain aggravating factors are found, the offense is "elevate[d] . . . from murder punishable by life imprisonment to murder punishable by death." *People v. Sailor*, 65 N.Y.2d 224, 232, 480 N.E.2d 701, 707, cert. denied, 474 U.S. 982 (1985). See *Linam v. Griffin*, 685 F.2d 369, 375 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

---

<sup>1</sup>The *amici* agree with the respondent that *Bullington* was erroneously decided and should be overruled. This brief makes the separate argument that, even assuming the correctness of *Bullington*, the Double Jeopardy Clause does not apply to noncapital sentencing proceedings.



(observing that although procedure in *Bullington* was technically bifurcated, "[i]n truth, the elements of the merits and the sentencing were wedded."); see also *Bullington*, 451 U.S. at 439 n.10 (finding significant that Missouri's capital sentencing statute required court, following guilty verdict, to "resume the trial and conduct a presentence hearing") (emphasis in *Bullington*). Thus, one can view the capital sentencing hearing as a continuation of the trial on guilt or innocence, to determine the magnitude of the defendant's offense.

Unlike the issues adjudicated in a capital sentencing hearing, the factfinder's determination of the defendant's status for the purpose of possible sentence enhancement is completely independent of the facts surrounding the crime for which the defendant is being sentenced. The single issue adjudicated at the sentence enhancement hearing is the existence of prior convictions. In other words, the inquiry is merely "whether or not the [defendant] standing before the court is the same person who was previously convicted as charged. The [factfinder] answers yes or no in accordance with the evidence." *Linam v. Griffin*, 685 F.2d at 375. This determination is not, "in all relevant respects . . . like the immediately preceding trial on the issue of guilt or innocence," *Bullington*, 451 U.S. at 438, and the factfinder, rather than determining the magnitude of the defendant's offense, simply ascertains whether prior convictions will affect the severity of current punishment. In short, "this is not the kind of adjudication that is referred to in the Fifth Amendment." *Linam v. Griffin*, 685 F.2d at 375.

## B. REJECTION OF A PRIOR CONVICTION ALLEGATION IS NOT "AN ACQUITTAL"

In 1896, this Court ruled that a criminal defendant who successfully appeals a judgment against him "may be tried anew . . . for the same offence of which he had been convicted." *United States v. Ball*, 163 U.S. 662, 672 (1896). Since that time, the Court has explained that the principle underlying *Ball* is primarily supported by two considerations. First, the Court has recognized that society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction," *United States v. Tateo*, 377 U.S. 463, 466 (1964), and second, "the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause." *Tibbs v. Florida*, 457 U.S. 31, 40 (1982).

In *Burks v. United States*, 437 U.S. 1, 18 (1978), however, the Court announced a narrow exception to the general rule, holding that the Double Jeopardy Clause bars retrial of a defendant whose conviction is set aside on the basis of evidentiary insufficiency. Recognizing that the Double Jeopardy Clause absolutely bars retrial of a defendant after acquittal, *Green v. United States*, 355 U.S. at 188, the Court reasoned that "[a] reversal based on the insufficiency of the evidence has the same effect [as an acquittal] because it means that no rational factfinder could have voted to convict the defendant." *Tibbs*, 457 U.S. at 41. It is only upon acquittal, therefore, or a determination tantamount to acquittal, that the Double Jeopardy Clause bars the readjudication of an allegation against the defendant. See *DiFrancesco*, 449 U.S. at 133

("Appeal of a sentence . . . would seem to be a violation of double jeopardy only if . . . , for double jeopardy finality purposes, the imposition of the sentence is an 'implied acquittal' of any greater sentence.").

For this reason, *Bullington*'s holding necessarily rested upon the predicate determination that "the jury's decision to sentence Bullington to life imprisonment after his first conviction should be treated as an 'acquittal' of the death penalty under the Double Jeopardy Clause." *Poland v. Arizona*, 476 U.S. at 153. Such an analogy, far from a perfect fit in the *Bullington* context, see *Poland*, 476 U.S. at 159 (Marshall, J., dissenting) ("[t]he analogy, first drawn in *Bullington v. Missouri*, . . . between an acquittal at trial and an 'acquittal' of death at sentencing, is not perfect . . ."), is wholly inapt to describe a factfinder's rejection of a prior conviction allegation.

First, "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." *DiFrancesco*, 449 U.S. at 133. See also *id.* at 132 ("neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support . . . an equation [of a criminal sentence to an acquittal]"). In *DiFrancesco*, the Court reaffirmed this principle, declining an invitation to liken the sentence imposed under a federal sentence enhancement scheme to an "acquittal" or "conviction" of sentence, despite the presence of procedural safeguards at sentencing. *Id.* at 133-137. That the proceedings at issue here may afford more procedural protections than traditional sentencing proceedings, or even more than those present in *DiFrancesco*, does not change the nature of sentences imposed in those proceedings, any more than the

safeguards employed by the federal sentencing court altered the nature of Mr. DiFrancesco's sentence. Petitioner's argument to the contrary ignores the "fundamental distinctions between a sentence and an acquittal, and . . . the particular significance of an acquittal." *Id.* at 133.

Second, even if the Court were inclined to analogize some forms of sentencing to "convictions" or "acquittals," the sentence imposed following a sentence enhancement proceeding simply cannot be described in such terms. Unlike the defendant acquitted following a trial on the issue of guilt or innocence, or the defendant "acquitted" of having committed a crime deserving death, the defendant facing an allegation that he has suffered prior convictions is not "acquitted" when the factfinder rejects that allegation, as the defendant's status as one with or without prior convictions does not change.

Whereas the defendant charged with a crime, or the one alleged to have committed a crime deserving death, cannot objectively be said to be "guilty" of that allegation until the factfinder pronounces him so, this is not the case for the defendant alleged to have suffered prior convictions. If a defendant does, in fact, have a prior conviction, the pronouncement of the factfinder simply cannot change that prior conviction status – any more than the defendant can be "acquitted" of being a certain age or sex.

Moreover, as noted by the New York Court of Appeals, the practical result of extending the analogy adopted in *Bullington* to noncapital sentence enhancement proceedings counsels against such an extension:

[A]rguably extension of the double jeopardy clause to enhanced sentencing proceedings . . . would seemingly mean that a failure to prove a defendant's previous felony conviction for any reason, even prosecutorial mistake or carelessness, unrelated to the truth of such prior convictions, which are matters of public record, would forever bar the use of that prior conviction in any subsequent enhanced sentencing proceeding.

*People v. Sailor*, 65 N.Y.2d at 236, 480 N.E.2d at 710.

In fact, taken to its logical extreme, treating sentence enhancement rulings as "acquittals" or "convictions" could mean that a state may attempt use of a defendant's prior conviction for enhancement purposes only once, whether successful or not. If the state fails to prove the existence of a prior conviction, the defendant will be deemed "acquitted" of the allegation that he has a prior conviction, and the state prohibited from attempting to prove the existence of that conviction in the future, presumably in connection with any other conviction or sentence. If the state does meet its burden of proving the existence of a prior conviction, the defendant will be deemed "convicted" of that allegation, again barring the state from ever attempting to prove it again. *See Carpenter v. Chapleau*, 72 F.3d 1269, 1272 (6th Cir.), *cert. denied*, 117 S.Ct. 108 (1996) (noting that the court had rejected a double jeopardy challenge to the state's using the same predicate offense for enhancement of more than one sentence) (*citing Montgomery v. Bordenkircher*, 620 F.2d 127 (6th Cir.), *cert. denied*, 449 U.S. 857 (1980)).

Nowhere has this Court ever suggested that consideration by a sentencing court of a defendant's prior convictions, even more than once, is an evil which the Double Jeopardy Clause was designed to prevent. On the contrary, it has stressed that "the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant - *if not essential* - [to the] selection of an appropriate sentence.'" *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (*quoting Williams v. New York*, 337 U.S. 241, 247 (1949)) (emphasis in *Lockett*). The Court should decline to adopt a rule which would cause such a result and which, in any event, constitutes an illogical extension of the analogy adopted in *Bullington*.

## II. IF THE DOUBLE JEOPARDY CLAUSE IS TO APPLY TO SENTENCING AT ALL, IT SHOULD BE LIMITED TO CAPITAL SENTENCING SCHEMES

Although the petitioner has focused upon the Court's reference to "hallmarks" in formulating his proposed extension of *Bullington* to noncapital sentencing, there is no historical or logical reason to do so. The Court's recognition in *Bullington* that the capital sentencing proceeding contained many of the features traditionally associated with a trial on guilt or innocence was not, in and of itself, dispositive of the case. Rather, what drove the result in *Bullington* - and indeed, the enactment of the Double Jeopardy Clause itself - were several considerations not applicable to the present case. Those considerations (as well as the factors discussed in Section I, *supra*) compel the conclusion that *Bullington* should not be extended.



A. *BULLINGTON* WAS BASED, IN LARGE PART,  
UPON ITS CAPITAL CONTEXT

This Court has suggested on more than one occasion that an essential element of the result reached in *Bullington* – an element not present in the sentencing schemes at issue here – was the fact that the Court there examined a capital sentencing proceeding. As the Court expressly stated in *Caspari v. Bohlen*, 510 U.S. at 392, "[b]oth *Bullington* and [*Arizona v. Rumsey*, 467 U.S. at 203] were capital cases, and [the] reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." See also *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) ("the decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal'" (bracketed phrase in original; citation omitted); *Bullington*, 451 U.S. at 446 ("the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial") (emphasis added); *Poland v. Arizona*, 476 U.S. at 155 ("*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate") (emphasis in original; citation omitted).

The result reached in *Caspari* also confirms that *Bullington*'s holding depended in large part upon its capital context. In *Caspari*, 510 U.S. at 393, the Court concluded that petitioner sought the benefit of a "new rule" because a rule requiring application of the Double Jeopardy Clause to noncapital sentencing proceedings was not dictated by the Court's precedents. As the Court repeatedly emphasized in *Caspari*, the reason that *Bullington* did not dictate the rule

sought by Mr. Bohlen was the fact that *Bullington* involved capital sentencing proceedings, and *Caspari* did not.

That the result in *Bullington* was based, in large part, upon its having been a capital case is further supported by the Court's decision in *DiFrancesco*. The Court decided *DiFrancesco* in December, 1980. Only five months later, within the same Term, the Court rendered its decision in *Bullington*. The different reasoning employed by the Court in those two cases – and of course the opposite results reached – suggest that an important factor distinguishing the two decisions was the difference in the penalties at stake. In examining the sentence enhancement statute challenged in *DiFrancesco*, the Court began by noting that it was addressing a sentencing scheme, traced the history of the rule differentiating sentencing from acquittal, and applied that rule to reach the same result it always had – that the Double Jeopardy Clause did not apply to sentencing. In *Bullington*, however, the Court did not begin with its usual premise. Rather, the Court immediately distinguished those cases which had previously addressed double jeopardy challenges to sentencing, stating that "[t]he history of sentencing practices is of little assistance to Missouri in this case, since the sentencing procedures for capital cases instituted after the decision in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] are unique." 451 U.S. at 441-442 n.15. The different posture from which the Court began its analyses in *DiFrancesco* and *Bullington* makes clear that the difference in the penalties was a primary factor informing its analysis.

The National Association of Criminal Defense Lawyers (NACDL), *amicus curiae* in support of petitioner, argue that the rule announced in *Bullington* should not be limited to capital

cases because "death is only different in the sense that it is largely in death penalty cases that this Court has relied on the Eighth Amendment to require of the states special criteria or procedures to ensure equitable and reliable punishment or outcomes." NACDL Br. at 4 (emphasis omitted). This is not so. To be sure, the Court has interpreted the Eighth Amendment to require certain procedures at capital sentencing hearings which are not required at noncapital sentencing. Nevertheless, the Court's differing treatment of capital and noncapital proceedings has not been limited solely to cases arising under the Eighth Amendment. See *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case."); see also *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984) (noting that the definition of "constitutionally effective assistance" may differ in capital and noncapital sentencing proceedings).

In any case, the contention that capital cases only differ from noncapital cases when being examined under the Eighth Amendment skirts the obvious point that the procedures employed in the sentencing scheme at issue in *Bullington* were only required *because* that was a capital sentencing scheme. The Court has construed the Eighth Amendment to require, in capital cases, procedural safeguards which guide the discretion of the sentencer. See *Furman v. Georgia*, 408 U.S. at 257, 310, 313; *Gregg v. Georgia*, 428 U.S. 153, 188-189, 197-198 (1976). These are the very same safeguards which rendered the *Bullington* procedure enough "like the trial on guilt or innocence" to bring it within the ambit of the Double Jeopardy Clause.

By contrast, the Court has not required legislatures to provide such safeguards in noncapital cases, see *Lockett v. Ohio*, 438 U.S. at 603, and most of the procedures employed in noncapital sentencing proceedings are merely a matter of legislative grace. It may be logical to conclude that because the Constitution requires certain safeguards at capital sentencing hearings, other constitutional protections will be deemed to apply as well. This conclusion is not so easily reached with reference to a hearing at which the majority of procedural safeguards have been granted, and may simply be withdrawn, by legislative enactment.

**B. THE VALUES UNDERLYING THE DOUBLE JEOPARDY CLAUSE ARE NOT UNDERMINED BY READJUDICATION OF A PRIOR CONVICTION ALLEGATION**

The "general design" of the Double Jeopardy Clause, *DiFrancesco*, 449 U.S. at 127, was eloquently described for the Court by Justice Black:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Green v. United States*, 355 U.S. at 187-188. Although the Court opined in *Bullington* that the values underlying the Double Jeopardy Clause are "equally applicable when a jury has rejected the State's claim that the defendant deserves to die," 451 U.S. at 445, they are not equally applicable to a simple factual determination that a defendant does or does not have a number of prior convictions, made for the purpose of choosing an appropriate sentence for a crime of which the defendant has already been convicted. At that point, as the Court observed in *DiFrancesco*, "[t]he defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." 449 U.S. at 136.

Moreover, the simplicity of the prior conviction inquiry, and its lack of factual relationship to the underlying convictions, distinguish the proceedings at issue here from those at issue in *Bullington*. In the capital context, both the trial on guilt or innocence and the sentencing hearing necessarily focus upon the defendant's behavior. The capital sentencing hearing not only permits but requires a detailed presentation of evidence regarding both the underlying crime and the character of the defendant. The sentencing scheme at issue here does no such thing. As described by the California Supreme Court,

a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case,

for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript.

*People v. Monge*, 16 Cal. 4th 826, 838, 941 P.2d 1121, 1129 (1997).

For these reasons, the "embarrassment, expense and ordeal" and the "anxiety and insecurity" potentially faced by a defendant during the penalty phase of a capital murder trial – which the Court found must "surely [be] at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," *Bullington*, 451 U.S. at 445 – are not equivalent to that experienced by a defendant simply facing a determination of his prior conviction status. Although a defendant may feel the anxiety associated with the potential imposition of an enhanced sentence, this is no different from the anxiety faced by any defendant awaiting sentencing. More importantly, it is not sufficient justification for extending the application of the Double Jeopardy Clause to sentence enhancement proceedings. See *DiFrancesco*, 449 U.S. at 137 ("The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.").

So too, any stigma potentially suffered by the defendant is associated not with the determination made at sentencing, but with the underlying conviction. A determination that the defendant should receive a longer sentence due to a prior conviction carries with it little if any of the stigma of a criminal conviction, and certainly not the degree associated with either



a criminal conviction or a determination that the defendant has committed a crime which is deserving of death.

The relative brevity and simplicity of the inquiry in a prior conviction proceeding also make inapplicable to noncapital sentence enhancement proceedings the final concern voiced by the Court in *Bullington* – "[t]he 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' thereby leading to an erroneously imposed death sentence, . . . if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." 451 U.S. at 445-446 (quoting *DiFrancesco*, 449 U.S. at 130). Readjudication of a sentencing enhancement allegation will not so "wear down the defendant" that it will lead to an erroneous result. As the Court observed in *Caspari*,

[p]ersistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.

510 U.S. at 396.

**C. THE PETITIONER'S "HALLMARKS TEST" IS AN ILLOGICAL APPLICATION OF *BULLINGTON* WHICH ELEVATES FORM OVER SUBSTANCE**

Petitioner's position is apparently premised upon his belief that under *Bullington*, the presence of certain features at sentencing automatically invokes the protection of the Double Jeopardy Clause. There is nothing in the mere presence or absence of certain procedural safeguards, however, such as the granting of a jury trial, the application of the rules of evidence, or even the standard of proof beyond a reasonable doubt, which suggests that double jeopardy protections must apply as well. Contrary to petitioner's contention, the applicability of the one does not automatically flow from the presence of the other.

The Double Jeopardy Clause bars successive prosecutions of a criminal offense not because of the format of a criminal trial or the procedural safeguards employed there, but because of the values underlying the Double Jeopardy Clause. These values are independent of the "hallmarks"; indeed, the Double Jeopardy Clause predates many of what we today recognize as the "hallmarks" of a trial on guilt or innocence. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that criminal defendants have the right to counsel); *In re Winship*, 397 U.S. 358, 361 (1970) (observing that the standard of proof beyond a reasonable doubt only "crystallized" "as late as 1798"). Thus, even assuming that the sentencing scheme at issue here would meet petitioner's "hallmarks" test, it does not follow that the presence of such "hallmarks" should automatically trigger the protection of the Double Jeopardy Clause.

Moreover, petitioner's rule elevates form over substance. Under petitioner's test, a defendant sentenced under a statute requiring proof beyond a reasonable doubt or giving the sentencing court only two sentencing options would be protected by the Double Jeopardy Clause, while one sentenced under a statute requiring proof by a preponderance of the evidence or granting the sentencing court a third option would have no such protection. Such a test, which examines the form of a hearing without contemplating its purpose or true effect upon a particular defendant, ignores the goals served by the Double Jeopardy Clause.

It cannot be the case that a constitutional protection as important as that afforded by the Double Jeopardy Clause will turn upon the procedural niceties established from state to state, or that simply reducing the standard of proof or granting the sentencing court a third choice will suffice to remove a sentencing scheme from the ambit of the Double Jeopardy Clause, where it would otherwise apply. A holding which yields this result diminishes the value of the constitutional protection itself. *See Sandin v. Conner*, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting) ("Deriving protected liberty interests from . . . local . . . codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from . . . New York, to . . . California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.'") (quoting the Declaration of Independence).

### III. A "HALLMARKS TEST" WOULD PRODUCE UNPREDICTABLE AND INCONSISTENT RESULTS, PENALIZE STATES FOR PROVIDING PROCEDURAL SAFEGUARDS AT SENTENCING, AND DISCOURAGE STATES FROM DOING SO IN THE FUTURE

Most, if not all, of the 50 states have at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense.<sup>2</sup> Each provision – whether a "three strikes law," a habitual or persistent offender statute, or a provision for enhanced sentencing for second or subsequent offenses – has its own

---

<sup>2</sup> Between 1993 and 1995, 24 states and the federal government enacted "three strikes" laws. Donna Lyons, "Three Strikes" Legislation Update, NAT'L CONF. ST. LEGIS., Dec. 1995. Twenty-three of those 24 states also have provisions for enhanced penalties for repeat offenders which predate their "three strikes" legislation. John Clark, et al., "Three Strikes and You're Out": A Review of State Legislation, NAT'L INST. JUST. RES. IN BRIEF, Sept. 1997, at 1, 9-10, exh. 10. In addition, almost every other state has at least one provision for enhanced sentencing of a habitual or persistent offender, or for second or subsequent offenses. *See, e.g.*, Alaska Stat. § 12.55.125(l); Ariz. Rev. Stat. § 13-604; Conn. Gen. Stat. § 53a-40; Del. Code Ann. tit. 11, §§ 4214, 4215; Haw. Rev. Stat. §§ 706-661, 706-662, 706-606.5; Ind. Code § 35-50-2-8; Iowa Code § 902.8; Ky. Rev. Stat. § 532.080; La. Rev. Stat. 15:529.1; Mass. Gen. L. ch. 279, § 25; Mo. Rev. Stat. § 558.016; Neb. Rev. Stat. § 29-2221; Nev. Rev. Stat. § 207.010; N.Y. Penal Laws §§ 70.04, 70.06, 70.08, 70.10; Okla. Stat. tit. 21, § 51; S.D. Codified Laws § 22-7-7; Wyo. Stat. §§ 6-10-201, 6-10-203. *See also Parke v. Raley*, 506 U.S. at 26-27 (noting that all 50 states and the federal government have enacted statutes which punish recidivism).

combination of applicable "hallmarks."<sup>3</sup> Thus, the test proposed by petitioner would require examination of each such state law to determine how many "hallmarks" are present. Because it is unclear, however, how many "hallmarks" will bring a sentencing scheme within the ambit of the Double Jeopardy Clause, which particular hallmarks will have that effect, or what will be the standard measure of a "trial on guilt or innocence," petitioner's rule would yield unpredictable and inconsistent results. *See People v. Levin*, 157 Ill. 2d 138, 147-148, 623 N.E.2d 317, 322 (1993), *cert. denied*, 513 U.S. 826 (1994) (observing that the Court in *Bullington* "did not address whether the presence of any one of the three trial-like factors upon which it relied would have been sufficient, alone, to support its trial analogy" or "place greater significance on any one factor over another.").

For example, because each state's procedure for the adjudication of guilt or innocence may differ in the number and type of "hallmarks," it is unclear whether the petitioner would require each state's sentencing proceeding to be measured against its own form of the trial on guilt or innocence, or against some general standard to be created by this Court. A decision adopting the petitioner's test, but declining to create a single standard against which to measure each state law, would introduce an element of unpredictability into the law, potentially generating inconsistent decisions in both the state

---

<sup>3</sup>For instance, of those states which require a separate hearing on sentence enhancement allegations, some require prior conviction allegations to be proven by a preponderance of the evidence, *see, e.g.*, Fla. Stat. § 775.084(3)(a)(4); N.D. Cent. Code § 12.1-32-09(4); 42 Pa. Cons. Stat. § 9714(D); Utah Code § 76-3-203.5(4)(c), while others require the allegations to be proven beyond a reasonable doubt. *See, e.g.*, Ind. Code § 35-50-2-8(d); La. Rev. Stat. 15:529.1D(1)(b); Mass. Gen. L. ch. 278, § 11A.

courts and the lower federal courts as those courts disagree about the quality and quantity of "hallmarks" which trigger the application of the Double Jeopardy Clause.<sup>4</sup> A clear statement that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings will prevent this result.

Limiting *Bullington* to capital sentencing hearings will also avoid an equally disturbing result. For the most part, the procedural safeguards provided by the states at noncapital sentence enhancement hearings are a matter of choice, not constitutional entitlement. If the states find, however, that by increasing procedural safeguards at sentencing proceedings they subject themselves to greater judicial scrutiny, and bring those proceedings within the ambit of the Double Jeopardy Clause, they may be forced to reconsider the safeguards which have been provided thus far, and discouraged from so providing in the future. *See Tibbs v. Florida*, 457 U.S. at 45 n.22 (noting that construing the Double Jeopardy Clause to bar retrial after a conviction is set aside as against the weight of evidence might serve to eliminate a practice which protects defendants by "prompt[ing] state legislatures simply to forbid [appellate] courts to reweigh the evidence.").

In *Sandin v. Conner*, 515 U.S. at 482, this Court recognized that finding constitutional entitlements in the mere fact that states had promulgated regulations to confine the discretion of prison personnel created disincentives for the states to do so, "discourag[ing] this desirable development."

---

<sup>4</sup>In fact, double jeopardy challenges to sentence enhancement proceedings have already created a number of divergent opinions in the state and federal courts. *See People v. Monge*, 16 Cal. 4th at 839-841, 941 P.2d at 1130 (discussing opinions accepting and rejecting such claims).



The same can be said here. There is no question that procedural safeguards at sentencing benefit the defendant, yet the rule proposed by petitioner discourages states from providing them. Likewise, given the Court's recognition in *Bullington* that unfettered discretion in the sentencer is a "hallmark" of traditional sentencing, whereas limited discretion is a "hallmark" of the trial on guilt or innocence, 451 U.S. at 439-441, petitioner's approach would discourage the states' implementation of statutes which guide the discretion of the sentencing court. Yet to do so would undermine what this Court has described as a positive development in the law. *See DiFrancesco*, 449 U.S. at 142-143 (noting that it had "been observed . . . that sentencing is one of the areas of the criminal justice system most in need of reform" and approving the sentencing scheme at issue as "a check upon th[e] unlimited power [of sentencing courts], [which] should lead to a greater degree of consistency in sentencing") (citing M. Frankel, *Criminal Sentences: Law Without Order* (1973)).

Given the lengthy sentences potentially available under state sentence enhancement laws, the states' implementation of procedural safeguards at sentencing and their legitimate efforts to guide the discretion of sentencing courts should be lauded and encouraged. Like the rule rejected in *Sandin*, the rule advocated by petitioner would have the opposite effect, effectively penalizing states for their attentiveness to the interests of criminal defendants. Because such an approach discourages states from implementing safeguards or cabining the discretion of sentencing courts, adoption of petitioner's position would likely work to the long term detriment of both the states and criminal defendants, and should be rejected.

## CONCLUSION

Based upon the foregoing, this Court should affirm the judgment of the California Supreme Court.

Respectfully submitted,

SCOTT HARSHBARGER  
Attorney General of Massachusetts

\* ELLYN H. LAZAR  
Assistant Attorney General

One Ashburton Place  
Boston, MA 02108  
(617) 727-2200

Counsel for *Amici* States

Of Counsel:  
Dan Schweitzer  
National Association of  
Attorneys General  
750 First Street, N.E.  
Suite 1100  
Washington, D.C. 20002

\* *Counsel of Record*  
March 27, 1998

(14)  
No. 97-6146

Supreme Court, U.S.

FILED

MAR 26 1998

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

ANGEL J. MONGE,

*Petitioner,*

vs.

THE STATE OF CALIFORNIA,

*Respondent.*

On Writ of Certiorari to the California Supreme Court

**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

KENT S. SCHEIDEGGER  
CHARLES L. HOBSON\*  
Criminal Justice Legal Fdn.  
2131 L Street  
Sacramento, CA 95816  
Telephone: (916) 446-0345

*Attorneys for Amicus Curiae  
Criminal Justice Legal Foundation*

\*Attorney of Record

39 pp  
**BEST AVAILABLE COPY**

## QUESTION PRESENTED

Should *Bullington v. Missouri* be overruled?



## TABLE OF CONTENTS

Question presented .....	i
Table of authorities .....	v
Interest of <i>amicus curiae</i> .....	1
Summary of facts and case .....	2
Summary of argument .....	2
Argument .....	3

### I

The present case is an appropriate vehicle to examine <i>Bullington's</i> validity .....	3
---	---

### II

<i>Stare decisis</i> does not prevent <i>Bullington</i> from being overturned .....	4
A. The limits of <i>stare decisis</i> .....	5
B. <i>Bullington</i> as precedent .....	6
1. Contrary to precedent .....	7
2. Type of decision .....	15
3. <i>Poland v. Arizona</i> .....	16

### III

<i>Bullington</i> should be overruled .....	18
A. Wrongly decided .....	18
1. History .....	18

2. Precedent .....	21
3. Contrary to principles .....	21
B. Confusion .....	24
C. Punishing good deeds .....	26
Conclusion .....	30

## TABLE OF AUTHORITIES

### Cases

Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) .....	15
Alabama v. Smith, 490 U. S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) .....	7
Arizona v. Rumsey, 467 U. S. 203, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984) .....	4, 16, 17, 24
Bailey v. United States, 516 U. S. 137, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995) .....	25
Briggs v. Procunier, 764 F. 2d 368 (CA5 1985) .....	24, 27
Bullington v. Missouri, 451 U. S. 430, 68 L. Ed. 2d 270, 101 S. Ct. 1852 (1981) .....	3, 4, 7, 8, 10-13, 16, 21-26
Burks v. United States, 437 U. S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) .....	15, 17, 19, 27
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 76 L. Ed. 815, 52 S. Ct. 443 (1932) .....	5
Carpenter v. Chapleau, 72 F. 3d 1269 (CA6 1996) ...	25, 27
Chaffin v. Stynchcombe, 412 U. S. 17, 36 L. Ed. 2d 714, 93 S. Ct. 1977 (1973) .....	7, 8, 11, 21, 23
Durosco v. Lewis, 882 F. 2d 357 (CA9 1989) .....	24, 27
Ex parte Lange, 18 Wall. (85 U. S.) 163, 21 L. Ed. 872 (1874) .....	4, 8, 19
Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717 (1880) ...	20
Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) .....	3, 8

Green v. United States, 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) .....	22, 23
Helvering v. Hallock, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444 (1940) .....	15, 29
Hertz v. Woodman, 218 U. S. 205, 54 L. Ed. 1001, 30 S. Ct. 621 (1910) .....	5
Hewitt v. Helms, 459 U. S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) .....	28, 29
Hudson v. United States, 522 U. S. ___, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997) .....	9, 10, 16, 17, 24
In re Oliver, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948) .....	9
Kepner v. United States, 195 U. S. 100, 49 L. Ed. 114, 24 S. Ct. 797 (1904) .....	13
Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905) .....	6
Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) .....	3
Morgan v. Illinois, 504 U. S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992) .....	3
Murray v. Giarratano, 492 U. S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) .....	3
Nelson v. Lockhart, 828 F. 2d 446 (CA8 1987) .....	27
North Carolina v. Pearce, 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969) .....	7, 10, 11, 20, 21
Patterson v. McLean Credit Union, 491 U. S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) .....	5, 6, 18

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) .....	5
People v. Frierson, 25 Cal. 3d 142, 158 Cal.Rptr. 281, 599 P. 2d 587 (1979) .....	13
People v. Levin, 623 N. E. 2d 317 (Ill. 1993) .....	24, 27
People v. Monge, 16 Cal. 4th 826, 66 Cal. Rptr. 2d 853, 941 P. 2d 1121 (1997) .....	2, 26
People v. Quinata, 634 P. 2d 413 (Colo. 1981) .....	27
People v. Sailor, 480 N. E. 2d 701 (N.Y. 1985) ..	24, 25, 27
Planned Parenthood v. Casey, 505 U. S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) .....	6, 15
Poland v. Arizona, 476 U. S. 147, 90 L. Ed. 2d 123, 106 S. Ct. 1749 (1986) .....	4, 14, 16, 17, 21, 25
Pulley v. Harris, 465 U. S. 37, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984) .....	13
Sanabria v. United States, 437 U. S. 54, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978) .....	17
Sandin v. Conner, 515 U. S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) .....	28, 29
Seminole Tribe of Florida v. Florida, 517 U. S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) .....	5, 24
State v. Cobb, 875 S. W. 2d 533 (Mo. 1994) .....	27
State v. Hennings, 670 P. 2d 256 (Wash. 1983) .....	27
Stroud v. United States, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50 (1919) .....	4, 7, 8, 10, 13, 21, 29
Swisher v. Brady, 438 U. S. 204, 57 L. Ed. 2d 705, 98 S. Ct. 2699 (1978) .....	28



United States v. Bryan, 339 U. S. 323, 94 L. Ed. 884, 70 S. Ct. 724 (1950) .....	6
United States v. DiFrancesco, 449 U. S. 117, 66 L. Ed. 2d 328, 101 S. Ct. 426 (1980) .....	7, 11-13, 15, 18, 19, 21, 23, 28, 29
United States v. Dixon, 509 U. S. 688, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) .....	8, 9, 16, 17, 18, 21, 24
United States v. Scott, 437 U. S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978) .....	6, 15
United States v. Tateo, 377 U. S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) .....	19, 27
United States v. Wilson, 420 U. S. 332, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975) .....	12, 18, 19
Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) .....	3, 25, 26
Wilmer v. Johnson, 30 F. 3d 451 (CA3 1994) .....	27
Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) .....	28
Woodall v. United States, 72 F. 3d 77 (CA8 1995) .....	27

#### United States Constitution

U. S. Const., Amdt. 5 .....	4, 19
-----------------------------	-------

#### State Statutes

Cal. Health & Safety Code § 11359 (West 1991) .....	2
Cal. Health & Safety Code § 11360(a) (West 1991) .....	2
Cal. Health & Safety Code § 11361(a) (West 1991) .....	2
Cal. Penal Code § 1170.12 (West Supp. 1998) .....	2

Cal. Penal Code § 190(a) (West 1988) .....	26
Cal. Penal Code § 245(a)(1) (West 1988) .....	2
Cal. Penal Code § 489(b) (West Supp. 1998) .....	25
Cal. Penal Code § 667.5(b) (West Supp. 1998) .....	25, 26
Cal. Penal Code § 667 (West Supp. 1998) .....	2, 25, 26

#### Treatise

4 W. Blackstone, Commentaries (1st ed. 1769) .....	18, 22
--	--------

#### Miscellaneous

Bennett, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor, 19 N.M.L. Rev. 451 (1989) .....	17
Douglas, Stare Decisis, 49 Colum. L. Rev. 735 (1949) ...	15
Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982) .....	14
J. Sigler, Double Jeopardy (1969) .....	18, 19, 22
Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1 (1979) .....	14
Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976) .....	6
The Federalist No. 78 (A. Hamilton) (Rossiter ed. 1961) ..	5

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

---

ANGEL J. MONGE,

*Petitioner,*

vs.

THE STATE OF CALIFORNIA,

*Respondent.*

---

---

**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF THE RESPONDENT**

---

---

**INTEREST OF AMICUS CURIAE**

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Swift and sure punishment is an essential feature of any worthwhile criminal justice system. *Bullington v. Missouri*, by needlessly importing double jeopardy concepts into sentencing hearings, makes the sentence process needlessly complex and too

---

i. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

prone to giving windfalls to guilty defendants. This undermining of the criminal justice system is contrary to the interests CJLF was formed to protect.

### SUMMARY OF FACTS AND CASE

Defendant was charged in Los Angeles County Superior Court with using a minor to sell marijuana, Cal. Health & Safety Code § 11361(a) (West 1991), sale or transportation of marijuana, § 11360(a), and possession of marijuana for sale, § 11359. *People v. Monge*, 16 Cal. 4th 826, 830, 941 P. 2d 1121, 1123 (1997). The People also alleged that defendant had a prior serious felony conviction, Cal. Penal Code § 245(a)(1) (West 1988), assault with a deadly weapon, under California's "Three Strikes" law, §§ 667(b)-(i), 1170.12(a)-(d) (West Supp. 1998). *Monge*, 16 Cal. 4th, at 830, 941 P. 2d, at 1123-1124. Defendant waived his right to a jury trial on the prior conviction and prior prison term allegations, and the trial court granted his motion to bifurcate the determination of those allegations. A jury found defendant guilty of the underlying offenses. The trial court tried the prior serious felony allegation, finding that defendant had previously been convicted of a serious felony. *Id.*, at 831, 941 P. 2d, at 1124.

The Court of Appeal affirmed the convictions but reversed the prior serious felony allegation, finding insufficient evidence to establish that defendant acted personally. *Ibid.* The appellate court further held that double jeopardy barred retrial of the prior serious felony allegation. The California Supreme Court reversed the double jeopardy finding. See *id.*, at 845, 941 P. 2d, at 1134 (plurality); *id.*, at 847, 941 P. 2d, at 1134 (Brown, J., concurring).

### SUMMARY OF ARGUMENT

*Stare decisis* does not preclude a re-examination of *Bullington v. Missouri*. That case contradicts prior precedents without overruling them. This creates confusion and disrespect for precedent, contrary to the interests *stare decisis* seeks to protect. Because *Bullington* is a constitutional decision, it must be afforded less protection under *stare decisis*. As *Bullington* has

also been compromised by *Poland v. Arizona*, it should be re-examined.

*Bullington* should be overruled. It is contrary to both the history of the Double Jeopardy Clause and this Court's interpretation of it. By focusing on the procedure involved rather than the hearing's consequences to defendant, *Bullington* is contrary to the principles of the Double Jeopardy Clause. Finally, as it punishes states for expanding protections to defendants, *Bullington* improperly discourages state experimentation in criminal procedure.

### ARGUMENT

#### I. The present case is an appropriate vehicle to examine *Bullington's* validity.

In *Bullington v. Missouri*, 451 U. S. 430 (1981), this Court created an unprecedented, open-ended break with its Double Jeopardy Clause jurisprudence. *Bullington* is an improper expansion of the defendant's Double Jeopardy rights which does not deserve the protection of *stare decisis*, see part II, *post*, and should be overruled. See part III, *post*.

This Court should not protect *Bullington* by creating a "death is different" shield around the decision. The few instances where this Court discriminates between capital and noncapital cases have come under the Eighth Amendment. See, e.g., *Murray v. Giarratano*, 492 U. S. 1, 8-9 (1989). The problems with this Court's "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan v. Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), are considerable. See, e.g., *Walton v. Arizona*, 497 U. S. 639, 661-669 (1990) (Scalia, J., concurring in part and concurring in the judgment) (describing results of inconsistency between the requirements of the *Furman v. Georgia*, 408 U. S. 238 (1972) (*per curiam*) and *Lockett v. Ohio*, 438 U. S. 586 (1978) lines of cases). They should not be imported into the rest of the Constitution.

If capital cases are to be treated differently under the Constitution, the difference should remain within the Eighth Amendment. Its text implicitly distinguishes between types of punishment—the



impermissible "cruel and unusual" punishments and the constitutional rest. The Double Jeopardy Clause makes no such distinction. It indiscriminately proscribes making any "person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.<sup>2</sup> In *Stroud v. United States*, 251 U. S. 15 (1919), this Court declined to distinguish for the purpose of double jeopardy between a life sentence imposed at the defendant's first trial and the death sentence at his second. See *id.*, at 18. *Stroud* remains good law.<sup>3</sup>

*Bullington* did not turn on any "death is different" argument, instead relying primarily upon a "hallmarks of the trial on guilt or innocence" standard. See 451 U. S., at 439. The one extension of *Bullington* invoked a similar indiscriminate standard. *Arizona v. Rumsey*, 467 U. S. 203, 209 (1984) (extending *Bullington* to Arizona capital procedures "that make [the sentencing proceeding] resemble a trial"). Any attempt to shield *Bullington* through the death penalty is a feeble, post hoc rationalization. *Bullington* should stand or fall on its own merits. As *amicus* will demonstrate, *Bullington*'s meager merits cannot support its repudiation of precedent or destructive effects.

## II. *Stare decisis* does not prevent *Bullington* from being overturned.

In *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984), this Court declined to overrule *Bullington v. Missouri*, 451 U. S. 430 (1981), a case it had "decided only three years ago." *Amicus* submits that it is now time for a re-examination of *Bullington*. The perspective of time, this Court's retreat from *Bullington* two years later in *Poland v. Arizona*, 476 U. S. 147 (1986), and *Bullington*'s

2. Although read literally, the clause would not apply to imprisonment, double jeopardy has always been understood to apply to any criminal sanction. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 170 (1874).

3. *Bullington* did not overrule *Stroud*, but instead distinguished it because the sentencing procedure employed in *Stroud* was less sophisticated than the one before the *Bullington* Court. See 451 U. S., at 439, n. 11. This distinction is untenable. See *post*, at 8.

possible spread outside the death penalty provide ample reasons for its re-examination.

### A. *The Limits of Stare Decisis.*

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The judiciary's role in our society is as an interpreter of laws. See *The Federalist* No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . ." *Hertz v. Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Therefore, this Court has "treated *stare decisis* as a 'principle of policy,' *Helvering v. Hallock*, 309 U. S. 106, 119 (1940), and not as an 'inexorable command.'" *Seminole Tribe of Florida v. Florida*, 517 U. S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U. S. 808, 828 (1991)).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because "'correction through legislative action is practically impossible,'" constitutional cases are more prone to re-examination than statutory cases. *Payne v. Tennessee*, 501 U. S. 808, 828 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); cf. *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the

Constitution, see Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner v. New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood v. Casey*, 505 U. S. 833, 861-862 (1992) (lead opinion). "Of course, it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States v. Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson, supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, 505 U. S., at 855 (lead opinion).

The fact that *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, "the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *United States v. Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet, supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

#### B. *Bullington* as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood v. Casey*, 505 U. S. 833, 854 (1992) (lead opinion). This involves a look into the type of decision involved, the reliance interest it invokes, and what impact overruling the decision would have on the public's

perception of the rule of law. See part I A, *supra*. In light of these factors, *Bullington v. Missouri*, 451 U. S. 430 (1981) invokes minimal protection from *stare decisis*.

#### 1. *Contrary to precedent.*

The strongest argument against *Bullington* is *Bullington's* own treatment of precedent. The *Bullington* decision cannot be squared with this Court's previous decisions on the relationship between the Double Jeopardy Clause and sentencing. Decisions that do not respect precedent should not be preserved simply as a matter of *stare decisis*. If a decision improperly overrules or distinguishes a set of precedents, *stare decisis* must not prevent a return to the earlier, correct decisions.

The *Bullington* Court understood that there was tension between its decision and prior case law. It framed the issue as whether *Stroud v. United States*, 251 U. S. 15 (1919) applied to a modern capital sentencing system. See *Bullington, supra*, 451 U. S., at 432. The Court found that imposing double jeopardy protections on modern capital sentencing schemes did not conflict with *Stroud* or any other precedents. The earlier decisions, which refused to apply double jeopardy to sentences, dealt with sentencing proceedings that were less complicated and thus less trial-like than the Missouri death sentence procedure in *Bullington*. See *id.*, at 438-441. This distinction allowed the *Bullington* Court to impose double jeopardy protections on Missouri's capital sentencing system without formally having to overrule any precedents. See *id.*, at 446.

*Bullington* distinguished four precedents, *United States v. DiFrancesco*, 449 U. S. 117 (1980), *Chaffin v. Stynchcombe*, 412 U. S. 17 (1973), *North Carolina v. Pearce*, 395 U. S. 711 (1969),<sup>4</sup> and *Stroud v. United States, supra*. Each of these cases is at least substantially compromised by the *Bullington* decision. Although *Bullington* claimed that it did not overrule these decisions, the effect of *Bullington* was to make these cases shadows of their former selves.

4. The companion case to *Pearce*, *Simpson v. Rice*, was overruled on other grounds in *Alabama v. Smith*, 490 U. S. 794, 802-803 (1989).



The first case distinguished, *Stroud*, provides perhaps the starkest conflict between *Bullington* and earlier precedent. Robert Stroud, the Birdman of Alcatraz,<sup>5</sup> was convicted of first-degree murder for killing a guard at Leavenworth prison and sentenced to death. His conviction was reversed, he was retried and again convicted of first-degree murder, but this time only sentenced to life. This conviction was also reversed and at his second retrial Stroud was again found guilty of first-degree murder and sentenced to death. *Stroud*, 251 U. S., at 16-17. Stroud challenged his last death sentence as being barred under double jeopardy by the life sentence imposed after the first retrial. *Id.*, at 17.

The *Stroud* Court held that sentencing was irrelevant to the Double Jeopardy Clause. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." *Id.*, at 18. The *Stroud* Court understood that jeopardy attached to acquittals from guilt, not sentences.<sup>6</sup> "The protection afforded by the Constitution is against a second trial for the same offense." *Ibid.* (emphasis added).

*Bullington's* attempt to distinguish *Stroud* is unsuccessful. It is true that *Stroud* and *Bullington* dealt with different sentencing procedures. *Stroud* involved a relatively uncomplicated system where the jury was simply asked whether defendant should not be given a death sentence, see *Bullington*, *supra*, 451 U. S., at 439, n. 11, while *Bullington* dealt with one of the death penalty proceedings that evolved after *Furman v. Georgia*, 408 U. S. 238 (1972). But this difference is irrelevant for the purpose of double jeopardy.

Double jeopardy is not imposed because a proceeding is relatively complicated, but because the proceeding involves the most important decision the law can make, whether a person is guilty of a crime. This is demonstrated in *United States v. Dixon*,

5. See *Chaffin*, *supra*, 412 U. S., at 23.

6. Double jeopardy does place one limit on sentences. It prevents a person from being punished twice for the same crime. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither *Bullington* nor the present case involves this type of multiple punishment.

509 U. S. 688 (1993), where this Court held that the Double Jeopardy Clause applied to nonsummary criminal contempt proceedings. It did so not because of how the proceedings were conducted, but because of what was at stake at the contempt proceedings. "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense.'" *Id.*, at 696 (emphasis added) (quoting *Bloom v. Illinois*, 391 U. S. 194, 201 (1968)). As other constitutional protections applied to nonsummary contempt proceedings "just as they do in other criminal prosecutions," there was no reason not to apply the Double Jeopardy Clause. *Ibid.*

In using the trial-like nature of Missouri's death sentence procedure to impose double jeopardy protections, *Bullington* placed the cart before the horse. Whether a proceeding is like a trial does not determine what constitutional rights it invokes; what matters is what is at stake. Thus in *In re Oliver*, 333 U. S. 257 (1948), this Court held that defendant had a right to a public trial in a contempt proceeding held by a "one-man grand jury." The grand jury could hold a witness in contempt without affording the witness anything resembling a trial. *Id.*, at 262. In spite of the fact that this proceeding in no way resembled a trial, the right to public trial was imposed because of the serious consequences of a contempt finding.

"Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." *Id.*, at 265 (emphasis added).

Eventually, this Court added so many rights to the nonsummary contempt proceeding that it now resembles a trial. See *Dixon*, *supra*, 509 U. S., at 696. But these were imposed not because of the complexity of the proceedings, but because of the consequences of a contempt finding. This point is reiterated in *Hudson v. United States*, 522 U. S. \_\_\_, 139 L. Ed. 2d 450, 456-



457, 118 S. Ct. 488, 491 (1997) where this Court found that an assessment made by the Comptroller of the Currency against bank executives did not invoke the double jeopardy ban against subsequent prosecution for the acts that led to the assessment. While the assessment was made pursuant to an administrative proceeding, this Court only examined the nature of the sanction and the intent of Congress in promulgating the sanction, not the process used to invoke it. See *id.*, at 459, 118 S. Ct., at 493.

*Bullington* also implied that the fact that the death penalty was involved made the sentencing hearing more like a trial. See 451 U. S., at 445. This placed *Bullington* in direct conflict with *Stroud*. The *Stroud* juries had to make the same decision as the juries in *Bullington*, whether defendant should be sentenced to death or imprisonment. The importance of this decision did not, however, influence the *Stroud* Court. The decision to inflict the death penalty was still no more than a sentencing question. As it did not go to the question of guilt, double jeopardy was irrelevant. See *Stroud*, 251 U. S., at 18.

The law of capital punishment did change between *Stroud* and *Bullington*. Starting with *Furman v. Georgia*, *supra*, this Court has invoked the Eighth Amendment to make radical changes in how, when, and against whom the death penalty is imposed. But *Bullington* is not an Eighth Amendment case. Death may be different under the Eighth Amendment, but until the *Bullington* Court chose to bypass *Stroud*, death was not different for the purposes of the Double Jeopardy Clause.

*North Carolina v. Pearce*, 395 U. S. 711 (1969) showed that the lessons of *Stroud* were undiminished after 50 years. In *Pearce*, a noncapital case, defendant won a reversal of his first conviction, and was given a higher sentence upon being convicted at retrial. *Id.*, at 713. The fact that the first sentence was shorter did not invoke double jeopardy. "Long-established constitutional doctrine makes clear that, beyond the requirement already discussed,<sup>7</sup> the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.*, at 719. This decision was the logical extension of the

7. That time served under the first sentence must be credited against whatever sentence is imposed after retrial. *Id.*, at 718-719.

government's power to retry defendant following most reversals. "[A]t least since 1919, when *Stroud v. United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Pearce*, 395 U. S., at 720 (emphasis added).

*Bullington* sought to distinguish *Pearce* on the ground that it did not involve a separate sentencing proceeding. *Bullington*, *supra*, 451 U. S., at 439. Because the sentencer in *Pearce* had a wide range of potential sentences and no standards for guidance, this decision could not be compared to the one in *Bullington*. *Ibid.* Yet *Pearce* did not turn on how the sentence was reached. Instead, it recognized that punishment and guilt are two separate issues, and only the latter invokes the Double Jeopardy Clause. See 395 U. S., at 720.

*Chaffin v. Stynchcombe*, 412 U. S. 17 (1973) received the same treatment from the *Bullington* Court as *Pearce*. *Chaffin* held that the underlying rationale of *Pearce* applies to jury sentencing as well as judge sentencing. *Id.*, at 18. *Chaffin* reaffirmed both *Stroud* and *Pearce*, declining any invitation to overrule them. See *id.*, at 24. *Bullington*'s effort to distinguish *Chaffin* by the nature of the proceeding was as unsuccessful as its effort to distinguish *Pearce*.

The final case distinguished by *Bullington*, *United States v. DiFrancesco*, 449 U. S. 117 (1980), shows how far *Bullington* had to stretch to avoid precedent. DiFrancesco was convicted in federal court of racketeering offenses, and had his sentence enhanced as a dangerous special offender. *Id.*, at 122. The United States appealed the dangerous offender sentence, claiming that the trial court abused its discretion in sentencing defendant to only one extra year for being a dangerous offender. See *id.*, at 123. The Court of Appeals dismissed the government's appeal on double jeopardy grounds. *Ibid.*

This Court held that the government's appeal of a sentence was not barred by double jeopardy. Appeal of a sentence could violate double jeopardy only if the initial sentence was viewed as an acquittal of any higher sentence. *Id.*, at 133. Neither history nor precedent could support this proposition. Historically,

pronouncement of sentence never carried the same finality that an acquittal did. *Ibid.* This was important because the "Double Jeopardy Clause was drafted with the common-law protections in mind." *Id.*, at 134. Allowing the government to appeal a sentence was a natural application of *Stroud*, *Pearce*, and *Chaffin*. These cases "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." See *id.*, at 134-135. Any other result would overrule *Pearce*. See *id.*, at 135-136, n. 14.

The sentencing proceeding in *DiFrancesco* had all the accoutrements of a trial. The dangerous special offender finding could be made only after a hearing in which defendant had a right to counsel, compulsory process, and cross-examination. The enhancement was imposed only if the trial court found by a preponderance of the evidence that defendant was a dangerous special offender. *Id.*, at 118-119, n. 1.

In spite of the great similarity between this proceeding and the one in *Bullington*, the *Bullington* Court felt that it could distinguish *DiFrancesco*. First it noted that *DiFrancesco* involved only an "appellate review of a sentence 'on the record of the sentencing court,' [18 U. S. C.] § 3576, not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington*, *supra*, 451 U. S., at 440. Yet *DiFrancesco* itself flatly rejected that very distinction. "While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as [in *DiFrancesco*], after appeal, *that difference is no more than a 'conceptual nicety.'*" *DiFrancesco*, 449 U. S., at 135-136 (emphasis added). The issue in *DiFrancesco* was "whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *Id.*, at 132. The Court understood that there were "fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *Id.*, at 133 (emphasis added). This, not the particular procedures of the sentencing hearing, formed the basis of the holding in *DiFrancesco*.

*Bullington's* distinction cannot be squared with the rest of double jeopardy law. The government cannot appeal after an acquittal. *United States v. Wilson*, 420 U. S. 332, 352 (1975). If

an appellate court reversed an acquittal and imposed a conviction on its own accord, it would be no less a violation of double jeopardy than if the government could retry an acquittal. See *Kepner v. United States*, 195 U. S. 100, 133 (1904). Yet *Bullington*, in its effort to avoid overruling *DiFrancesco*, would turn this difference into a distinction of constitutional significance. In so doing, it adds *Wilson* and *Kepner* to the list of precedents it flouts.

*Bullington* next tried to distinguish *DiFrancesco* on the ground that *DiFrancesco* involved a sentencing scheme where the judge had a far broader choice of possible sentences than the one in *Bullington*. *Bullington*, *supra*, 451 U. S., at 440-441. Once again, this is a distinction without any constitutional difference. *DiFrancesco* did not turn on the fact that the sentencer could impose any sentence not to exceed 25 years, a fact it only mentions in passing. See *DiFrancesco*, *supra*, 449 U. S., at 119, n. 1. The *DiFrancesco* Court relied in part upon *Stroud*, where, as in *Bullington*, the sentencing jury only had two options, life imprisonment or death. See *id.*, at 135 (citing *Stroud*); *Stroud*, *supra*, 251 U. S., at 17-18.

Finally, the *Bullington* Court attempted to distinguish the trial-like nature of the special offender hearing in *DiFrancesco* on the ground that it only required the prosecution to prove its case by a preponderance of the evidence, while the sentencing system in *Bullington* required proof beyond a reasonable doubt. 451 U. S., at 441. This distinction places too much emphasis on what is an anomaly of Missouri's capital sentencing scheme.

Many state capital sentencing schemes have a reasonable doubt standard for the eligibility finding but not for the final sentencing decision. See, e.g., *People v. Frierson*, 25 Cal. 3d 142, 180, 599 P. 2d 587, 609 (1979) (upholding California's 1977 death penalty law). This Court has upheld such systems. See, e.g., *Pulley v. Harris*, 465 U. S. 37, 54 (1984) (same). If *Bullington* distinguished *DiFrancesco* because Missouri imposed the reasonable doubt standard on the final sentencing decision, then *Bullington* is based upon a procedural anomaly of Missouri's death penalty law. If the *Bullington* Court was referring to the fact that Missouri imposes the reasonable doubt standard for eligibility, then this decision is much narrower than commonly thought; it would not preclude resentencing a defendant to death if the first



jury found him eligible but sentenced him to life. It would also be much more in conflict with *Poland v. Arizona*, 476 U. S. 147, 155-156 (1986) which declined to extend *Bullington* to eligibility findings. This would further weaken *Bullington* as precedent. See part I B 3, *post*, at 16-18.

*DiFrancesco* did not turn on the standard of proof. It was a continuation of cases starting with *Stroud* that jeopardy does not attach to the decision of the sentencer. The burden of proof for imposing a sentence was irrelevant to double jeopardy analysis until *Bullington*. If *stare decisis* is to have any authority, cases must be distinguished only upon meaningful grounds. Any case can be "distinguished" from a prior decision. There will always be some difference in the procedural posture or factual setting that will support a claim that the cases are different. If trivial differences are enough to distinguish cases, then *stare decisis* will have no meaning.

"[T]o view *stare decisis* as requiring identical decision only upon identical material facts as they are seen by the nonprecedent court . . . is to impose little constraint by the doctrine. *Stare decisis*, so loosely understood, leaves the nonprecedent court free to avoid the bonds of preceding cases by recasting their material facts or assigning reasons to the prior decisions quite distinct from those originally assigned. With this leeway, courts will seldom be faced with the necessity for explicit overruling." Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 9, n. 37 (1979) (emphasis added).

*Stroud*, *Pearce*, *Chaffin*, and *DiFrancesco* all stand for one principle—that double jeopardy does not prevent the imposition at a later proceeding of a higher sentence than had been imposed at an earlier proceeding. In *Bullington*, this Court said that there were times when double jeopardy prevents imposing a higher sentence at a later hearing. *Bullington* and *DiFrancesco* thus stand as a prime example of this Court rendering mutually inconsistent decisions. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 811, n. 25 (1982). *Stare decisis* requires that this inconsistency be resolved.

This Court must resolve conflicts between its precedents. If a decision contradicts the principles of an earlier case, confusion

in the lower courts is inevitable. If two decisions are in conflict, *stare decisis* does not prevent a return to an earlier correct decision. See *Helvering v. Hallock*, 309 U. S. 106, 119 (1940).

"Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, 'special justification' exists to depart from the recently decided case." *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 231 (1995) (opinion of O'Connor, J.).

*Bullington's* cavalier avoidance of prior authority is the type of situational decision that can only undermine respect for *stare decisis* and this Court.

## 2. Type of decision.

The problems caused by *Bullington* are particularly severe because of the type of decision it is. *Bullington* is a constitutional decision, and unless the Constitution is amended, overruling is the only other method of correcting its errors. Thus, constitutional decisions are traditionally afforded less *stare decisis* protection than statutory decisions, which are always susceptible to congressional action.

Some constitutional decisions warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood v. Casey*, 505 U. S. 833, 867 (1992). *Bullington* is not such a case. While it is important, the Double Jeopardy Clause has not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 737 (1949). Double jeopardy is a very complicated part of the law. See *DiFrancesco*, *supra*, 449 U. S., at 127. Therefore, this Court has periodically reversed course and overruled prior double jeopardy decisions. See, e.g., *United States v. Scott*, 437 U. S. 82, 86-87 (1978) (overruling *United States v. Jenkins*, 420 U. S. 358 (1975)); *Burks v. United States*, 437 U. S.



1, 6-10, 18 (1978) (overruling several prior cases); *United States v. Dixon*, 509 U. S. 688, 704 (1993) (overruling *Grady v. Corbin*, 495 U. S. 508 (1990)); *Hudson v. United States*, 522 U. S. \_\_\_, 139 L. Ed. 2d 450, 460-461, 118 S. Ct. 488, 494-495 (1997) (overruling *United States v. Halper*, 490 U. S. 435 (1989)). *Stare decisis* is at its weakest in this most technical part of the law.

### 3. *Poland v. Arizona*.

*Bullington's* potential for confusion is also demonstrated by this Court's retreat from it in *Poland v. Arizona*, 476 U. S. 147 (1986). In *Poland*, a capital case, the trial court erroneously held that a murder committed during an armed robbery could not support a murder for pecuniary gain finding. It nonetheless sentenced the defendants to death because it found that the murders were "especially heinous, cruel [or] depraved." *Id.*, at 149. The Arizona Supreme Court reversed the guilty verdict, found that there was insufficient evidence to support the especially heinous circumstance, and noted that murder for pecuniary gain was supported by armed robbery murder. On retrial, the defendants were again convicted on first-degree murder and again sentenced to death on the pecuniary gain, especially heinous grounds. *Id.*, at 149-150. The Arizona Supreme Court upheld the death sentences for both defendants on the pecuniary gain grounds. *Id.*, at 151.

This Court upheld the sentences, finding no conflict with *Bullington*. The *Poland* Court held that applying double jeopardy to individual aggravating circumstances would require viewing "the capital sentencing hearing as a set of minitrials . . . ." *Id.*, at 156. This would push *Bullington's* trial analogy "past the breaking point" and thus was unacceptable. *Ibid.*

While the decision not to extend *Bullington* was proper, it is very difficult to harmonize *Poland* with the rationale of *Bullington*. *Bullington* held that the decision not to impose death constituted an acquittal because the Missouri sentencing procedure that decided this issue was so like a trial. See *Bullington*, *supra*, 451 U. S., at 438, 445. Using the same reasoning, this Court applied double jeopardy to Arizona's capital sentencing hearing. See *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984). In Arizona, the decision on an individual aggravating circumstance

is made at this same trial-like capital sentencing hearing. See *id.*, at 210. Like the penalty question in *Bullington*, in Arizona "[t]he usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt." *Ibid.*

The *Poland* Court ignored this symmetry and refused to apply *Bullington*, asserting that its case was different because there had never been a verdict of life imprisonment. See *Poland*, *supra*, 476 U. S., at 154. This flatly contradicts traditional double jeopardy principles as applied to guilty verdicts. Once an appellate court finds that there was insufficient evidence to support a conviction, double jeopardy prevents retrial. *Burks v. United States*, 437 U. S. 1, 16 (1978). Furthermore, an erroneous acquittal is also protected under double jeopardy. *Sanabria v. United States*, 437 U. S. 54, 68-69 (1978). Therefore, if Arizona's death penalty procedure was considered a trial for double jeopardy purposes, see *Rumsey*, 467 U. S., at 205 (applying *Bullington*), the failure to find the aggravating circumstance at the first penalty "trial" should have operated as an acquittal.

*Poland* represents a headlong retreat from the trial metaphor of *Bullington*. "[W]hen confronted in *Poland* with the logical conclusion of the course it set in *Bullington*, the Court contents itself with a statement which in essence says simply: 'We will not go that far.'" Bennett, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor, 19 N.M.L. Rev. 451, 465 (1989). When this Court backs off from a significant portion of a precedent, it is strong evidence that the precedent is unworkable and should be re-examined. Cf. *United States v. Dixon*, 509 U. S. 688, 709 (1993) (decision in *United States v. Felix*, 503 U. S. 378 (1992), creating large exception to *Grady v. Corbin*, 495 U. S. 508 (1990), demonstrated the need to overrule *Grady*); *Hudson v. United States*, *supra*, 139 L. Ed. 2d 450, 451, 118 S. Ct. 488, 494-495 (1997) (decisions in *Department of Revenue of Mont. v. Kurth Ranch*, 511 U. S. 767 (1994) and *United States v. Ursery*, 518 U. S. \_\_\_, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996) undercut *United States v. Halper*, 490 U. S. 435 (1989)). After *Poland*, *Bullington* is an anomaly in the law, contradicted by cases decided before and after it.

When developments in the law rob a decision of its authority, it is time to re-examine the old decision. See *Patterson v. McLean Credit Union*, 491 U. S. 164, 173 (1989). When a case contradicts "an 'unbroken line of decisions' . . . and has produced 'confusion,'" it is time to re-examine the precedent. *Dixon, supra*, 509 U. S., at 711-712. Therefore, a re-examination of *Bullington* is in order.

### III. *Bullington* should be overruled.

#### A. *Wrongly Decided.*

When deciding whether a practice should invoke the Double Jeopardy Clause, this Court has looked to the historical treatment of the practice, this Court's precedents, and the underlying purpose of the Double Jeopardy Clause. See *United States v. DiFrancesco*, 449 U. S. 117, 132 (1980). Viewed through this analysis, sentencing, regardless of the procedural form it takes, cannot invoke the Double Jeopardy Clause's protection against retrial. *Bullington* failed to apply this analysis to the issue before it, and therefore was improperly decided.

#### 1. *History.*

History is the most important tool for interpreting the Double Jeopardy Clause. Double jeopardy is amongst our oldest legal principles, with roots as far back as Greek and Roman law. See J. Sigler, *Double Jeopardy* 2 (1969). While double jeopardy had an initially rocky start under the common law, Coke and Blackstone enshrined it as a part of England's legal heritage. See *id.*, at 16-20. The Founders recognized the importance of this heritage and used Blackstone's definition as the basis of the Double Jeopardy Clause. See *United States v. Wilson*, 420 U. S. 332, 340-342 (1975). "The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind." *DiFrancesco, supra*, 449 U. S., at 134.

At the common law, the prohibition took the form of three pleas: *autre fois acquit*, former acquittal; *autre fois convict*, former conviction; and *autre fois attaint*, former attainder. See 4 W. Blackstone, *Commentaries* 329-330 (1st ed. 1769). The first

two interests are protected under the Double Jeopardy Clause, while former attainder is now obsolete. See Sigler, *supra*, at 18. The sentencing practices in *Bullington* and the present case invoke neither former acquittal nor former conviction.

Historically, neither of these protections were invoked by the pronouncement of sentence. The only limit on sentencing was the prohibition against punishing someone again after they had already completed the imposed sentence, or imposing a sentence greater than that allowed by law. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither of these prohibitions was invoked in *Bullington* nor the present case. This is the furthest that double jeopardy extends into sentencing.

"Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial." *DiFrancesco, supra*, 449 U. S., at 133. As imprisonment became the more common form of punishment, this distinction became more important. Thus a trial court could increase a sentence without violating double jeopardy, so long as it was done during the same term of the court as the initial sentence. See *Lange, supra*, 18 Wall., at 167. Similarly, it was "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least . . . so long as he has not yet begun to serve that sentence." *DiFrancesco*, 449 U. S., at 134.

The Double Jeopardy Clause states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. This language was adopted to prevent the retrial of an acquitted defendant, while at the same time allowing a defendant to seek a new trial on appeal from the conviction. See *Wilson, supra*, 420 U. S., at 341. Thus, allowing a retrial after defendant's conviction is reversed,<sup>8</sup> "is a well-established part of our constitutional jurisprudence." *United States v. Tateo*, 377 U. S. 463, 465 (1964). This principle is the basis for the modern distinction between sentencing and conviction. "[I]t rests ultimately upon the premise that the original

8. Except when the reversal is for insufficient evidence. See *Burks v. United States*, 437 U. S. 1, 16 (1978).



conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U. S. 711, 721 (1969). As the slate has been "wiped clean," any legal sentence may be imposed upon retrial.<sup>9</sup>

"But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball*, *supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years." *Id.*, at 721 (emphasis in original).

This principle is derived from the original intent behind the particular language of the Double Jeopardy Clause. The Clause was adopted in its particular form so that defendant could be tried and sentenced again after obtaining a reversal. Logic compels us to recognize, as the *Pearce* Court did, that if the slate is clean for the conviction, it must be so for the sentence.

The *Bullington* Court did not attempt any in-depth historical analysis of its position. While it made great efforts to distinguish the many cases its holding conflicted with, it ignored history. This failure to deal with history now warrants reversal.

"We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880).

9. Provided that any judge-imposed sentence is not vindictively higher than the original sentence and thus a violation of due process. See *id.*, at 725-726.

It is time to bring the Double Jeopardy Clause back from *Bullington*'s "depth of speculation."

## 2. Precedent.

In addition to ignoring history, *Bullington* also has no support in precedent. Its contradiction of prior decisions, primarily *United States v. DiFrancesco*, *supra*, *Chaffin v. Stynchcombe*, 412 U. S. 17 (1973), *North Carolina v. Pearce*, *supra*, and *Stroud v. United States*, 251 U. S. 15 (1919), and its contradiction by *Poland v. Arizona*, 476 U. S. 147 (1986) are discussed extensively earlier in this brief. See part I B 1 & 3, *supra*, at 7-15, 16-18. In addition to weakening *stare decisis* support for the case, the fact that *Bullington* contradicts prior decisions and is contradicted by subsequent cases also provides a good reason for overruling *Bullington*. See *United States v. Dixon*, 509 U. S. 688 (1993).

## 3. Contrary to principles.

In addition to ignoring history and precedent, *Bullington* contradicts the general principles that form the foundation of the Double Jeopardy Clause. In its effort to distinguish *North Carolina v. Pearce*, *supra*, the *Bullington* Court called forth this Court's classic statement of the principles of the Double Jeopardy Clause.

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Bullington*, *supra*, 451 U. S., at 445 (quoting *Green v. United States*, 355 U. S. 184, 187-188 (1957)).

*Green* recognizes two key protections are provided by the Double Jeopardy Clause: protecting the innocent from being convicted, and protecting the defendant from government harassment through repeated litigation. Neither of these principles were violated by the state courts in *Bullington* or the present case.



Of these two goals, protecting the innocent is the most important. It is a fundamental principle of our criminal justice system that we must make all reasonable efforts to avoid convicting the innocent. Thus, it is better to let ten guilty persons go free than to convict one innocent person. See 4 W. Blackstone, Commentaries 352 (1st ed. 1769). Sentencing never comes into conflict with this principle. Before a defendant is sentenced, he must first be found guilty.

The second principle of *Green*, protecting defendants from harassment, is related to protecting the innocent. In addition to running the risk that an innocent person may be convicted, the threat of retrial may coerce an innocent person into pleading guilty to a lesser charge. This is perhaps the most important part of double jeopardy. The ability to use its resources to coerce any citizen to do its will is an essential tool of the totalitarian state. Thus double jeopardy was foreign to the criminal law of Nazi Germany, Fascist Italy, and the pre-Khrushchev Soviet Union. See Sigler, *supra*, at 145-146.

As it relates to innocence, the ability of the state to wear down individuals is not invoked by sentencing. Until a person is found guilty, sentencing is irrelevant.

The Double Jeopardy Clause protects more than the innocent. It will even preserve an apparently erroneous acquittal. See *Green v. United States*, 355 U. S. 184, 188 (1957). This serves double jeopardy's general protection against harassment. This interest is not served by treating a lesser sentence as an acquittal of a greater one.

*Green* fought to protect all acquitted defendants from undergoing additional "embarrassment, expense and ordeal." See *id.*, at 187. A new sentencing hearing cannot cause a defendant any further embarrassment. He has already been convicted of a crime; the sentencing hearing simply determines his just deserts. Nor should the extra expense of the sentencing hearing justify double jeopardy protection. A resentenced defendant has already been through at least a trial, a sentencing hearing, and a successful appeal before being resentenced. Many will also have been through a second trial at their own request. See, e.g., *Bullington*, *supra*, 451 U. S., at 436. Given the large proportion of defendants

for whom the state pays defense costs, the additional expense of a second sentencing hearing is usually *de minimis*.

A new sentencing hearing is not a particularly harsh ordeal for defendant. He has already been through the ordeal of being convicted and is about to experience the ordeal of punishment. The sentencing hearing is simply the means of determining the extent of his future punishment. The fact that a higher sentence is imposed at the second hearing does not change this calculus. "The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin v. Stynchcombe*, 412 U. S. 17, 25 (1973).

*Green* also sought to protect defendants from the continued anxiety and insecurity caused by retrial. 355 U. S., at 187. Whatever extra anxiety and insecurity is caused by a new sentencing hearing is not of constitutional magnitude. The defendant has already been found guilty. He knows he is going to be punished; the only issue is how much. As *Chaffin* recognized, the possibility of a higher sentence after retrial is a legitimate part of retrial. 412 U. S., at 25.

*Bullington* implies that resentencing was a particular cause of anxiety and ordeal when the death penalty was involved. *Bullington*, *supra*, 451 U. S., at 445. This is one of the most dangerous arguments in *Bullington*. The notion of treating capital cases differently has largely been confined to the Eighth Amendment, spawning a complicated body of law. See part I, *supra*. Double jeopardy is complicated enough as it is. See *United States v. DiFrancesco*, 449 U. S. 117, 126-127 (1980) (citing extensive and often inconsistent case law). There is no reason to further complicate it by importing Eighth Amendment concepts.

While the sentencer's choice between a life sentence and death is important, this decision must be viewed in this context. A defendant facing this decision has already been convicted of a capital crime. A death sentence, so long as it is imposed in accordance with the Eighth Amendment, is a lawful sentence and should be treated the same as any other sentence. See *Bullington*, *supra*, 451 U. S., at 451-452 (Powell, J., dissenting).

### B. Confusion.

In addition to being contrary to precedent and bad policy, *Bullington v. Missouri*, 451 U. S. 430 (1981) is also confusing. Its standard, "the hallmarks of the trial on guilt or innocence," confuses the lower courts, spawning a "wide variety of novel double jeopardy claims." *Id.*, at 439. Cf. *Hudson v. United States*, 522 U. S. \_\_\_, 139 L. Ed. 2d 450, 458, 118 S. Ct. 488, 493 (1997). *Bullington's* confusing, ill-considered standard is yet one more reason to overturn the decision. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U. S. 44, 63-64 (1996); *United States v. Dixon*, 509 U. S. 688, 711-712 (1993).

The problem with administering *Bullington's* "hallmarks" standard is in the many subtle variations of sentencing procedures presented to the courts. Some courts have justified extending *Bullington* on the basis of only one procedure benefitting defendant, such as applying the reasonable doubt standard to the predicate facts for the sentence enhancement. See, e.g., *Durosko v. Lewis*, 882 F. 2d 357, 359 (CA9 1989); *Briggs v. Procunier*, 764 F. 2d 368, 371 (CA5 1985). Other jurisdictions take a more comprehensive approach, requiring that all three of the factors found in *Bullington* must be present to be protected under double jeopardy. See *People v. Levin*, 623 N. E. 2d 317 (Ill. 1993) (right to present evidence and cross-examine, reasonable doubt standard, and only two sentencing alternatives).

Other factors may also influence this already complex decision. In *People v. Sailor*, 480 N. E. 2d 701, 705-710 (N.Y. 1985), New York's high court used the context of a sentencing statute to distinguish it from *Bullington*. The death penalty statutes in *Bullington* and *Arizona v. Rumsey*, 467 U. S. 203 (1984) were "part and parcel of the substantive offense of capital murder [citations] in which the existence of certain aggravating circumstances elevate the crime charged from murder punishable by life imprisonment to murder punishable by death." *Sailor*, 480 N. E. 2d, at 707. New York's persistent felony offender statutes, however, "are concerned solely with a defendant's prior criminal record, and, in the case of a persistent felon, 'factors in the defendant's background and prior criminal conduct' " deemed relevant by the court. *Ibid.* The persistent felony statutes thus did not aggravate "the substantive offense elevating it to a higher class

...." *Id.*, at 708. This structural difference, along with the difference between imposing death and life imprisonment, allowed the Court of Appeals to distinguish *Bullington*. *Ibid.* Unfortunately, the *Sailor* Court's structural analysis was wrong. "Aggravating circumstances are not separate penalties or offenses ...." *Poland v. Arizona*, 476 U. S. 147, 156 (1986). An aggravating circumstance is therefore not an element of the crime of capital murder. *Walton v. Arizona*, 497 U. S. 639, 649 (1990). *Sailor* demonstrates that *Bullington's* unnatural mix of double jeopardy and sentencing procedures leads to confusion.

Although improperly executed, *Sailor's* holding that the structure of a sentencing statute is relevant to *Bullington's* application is analytically sound. Sentencing schemes can and do have complex structures. Some may be largely divorced from the underlying offense, such as habitual offender statutes. Others will bear a much closer factual relationship to the underlying offense such as weapons enhancements. See, e.g., *Bailey v. United States*, 516 U. S. 137 (1995) (interpreting 18 U. S. C. § 924(c)(1)). The relationship of the sentence to the underlying facts of the crime may thus also influence the *Bullington* analysis. See *Carpenter v. Chappleau*, 72 F. 3d 1269, 1274 (CA6 1996). This intricate, convoluted, and too often incorrect analysis reinforces the confusion in the lower courts' application of *Bullington*.

*Bullington* has added one final layer of complexity to the Double Jeopardy Clause. Although the decision was not based on any "death is different" agenda, see part I, *supra*, the gravity of the death versus life imprisonment decision did influence the Court's analysis. See *Bullington*, 451 U. S., at 445. This distinction may not be confined to the difference between death and life. The existence of a particular enhancement or other sentencing fact can greatly increase a prison sentence. For example, in California, grand theft can be punished as a felony with a one-year prison sentence. See Cal. Penal Code § 489(b) (West Supp. 1998). A person who is convicted of grand theft with one prior serious felony conviction is subject to a three-year sentence. See § 667(e)(1) (doubling base term); § 667.5(b) (one-year enhancement for a prior prison term). If the People prove the existence of a second prior serious felony conviction, then the base sentence



jumps to 25-years-to-life, see § 667(e)(2), plus an extra two years for the two prior prison terms. § 667.5(b).

The existence of one prior felony, which raises the punishment for grand theft to that for noncapital first-degree murder, see § 190(a) (West 1988), may thus cause enough anxiety in a defendant to trigger *Bullington*'s protection. If it does, then the *Bullington* rule will force courts to evaluate the vast, subtle variations in prison sentences presented by state and federal sentencing schemes. If the defendant in the present case had a second prior serious felony allegation proven against him, his sentence would be increased from 11 years, see *People v. Monge*, 16 Cal. 4th 826, 831, 941 P. 2d 1121, 1124 (1997) (plurality), to 27-to-life. See Cal. Penal Code § 667.5(b). This less dramatic enhancement than the one demonstrated in the hypothetical above may not be enough to trigger *Bullington*, leaving the Double Jeopardy Clause's application dependent upon the particular defendant being sentenced under the same statute.

*Bullington* is a mess. This Court now has the opportunity to clean it up quickly and efficiently by returning to the simple standard of *Stroud*, *Pearce*, and *DiFrancesco* that sentencing is not subject to the Double Jeopardy Clause.

### C. Punishing Good Deeds.

In addition to being contrary to the law, *Bullington* also sets a disturbing example to the states and Congress. An important reason for its decision to extend the Double Jeopardy Clause to Missouri's capital sentencing scheme was the fact that it used the reasonable doubt standard. *Bullington v. Missouri*, 451 U. S. 430, 441 (1981). Yet there is no constitutional requirement that sentencing findings be proved beyond a reasonable doubt. See part I B 1, *supra*, at 13-14. In other contexts, this Court has explicitly rejected the assertion that the sentencing decision requires all the protections of the guilt determination. See *Walton v. Arizona*, 497 U. S. 639, 647-648 (1990) (jury trial). *Bullington*, by imposing greater constitutional burdens on a state procedure because it is more helpful to defendant, encourages states to provide the accused with only the minimum procedural protection. The chilling effect this has on state criminal procedure warrants overruling *Bullington*.

Courts have responded to *Bullington* by punishing states for providing defendants with extra rights at sentencing. Those jurisdictions which have applied *Bullington* to noncapital cases have relied primarily upon the rights accorded defendants in the relevant sentencing proceedings. See, e.g., *Durosko v. Lewis*, 882 F. 2d 357, 359 (CA9 1989) (reasonable doubt); *Nelson v. Lockhart*, 828 F. 2d 446, 447-448 (CA8 1987), rev'd on other grounds, *Lockhart v. Nelson*, 488 U. S. 33 (1988) (both sides present evidence, cross-examination, reasonable doubt); *Briggs v. Procnier*, 764 F. 2d 368, 371 (CA5 1985) (reasonable doubt); *State v. Hennings*, 670 P. 2d 256, 261-262 (Wash. 1983) (reasonable doubt, bifurcated proceedings, limited discretion); *People v. Quinata*, 634 P. 2d 413, 419 (Colo. 1981) (reasonable doubt, bifurcated proceedings, separate verdict). Similarly some jurisdictions have held *Bullington* applicable to noncapital cases, but declined to apply it to specific sentencing processes that were insufficiently beneficial to defendant. Thus in *People v. Levin*, 623 N. E. 2d 317, 324 (Ill. 1993), the court noted that while the capital sentencing provision in *Bullington* contained "many of the due process protections afforded a defendant at trial on the issue of guilt," Illinois habitual offender procedure was distinguishable because it was less beneficial to defendants. "These same evidentiary and procedural safeguards, however, are not present . . ." *Ibid.* Other courts have reached similar conclusions under similar analysis. See, e.g., *Carpenter v. Chapleau*, 72 F. 3d 1269, 1273-1274 (CA6 1996); *Woodall v. United States*, 72 F. 3d 77, 79-80 (CA8 1995); *Wilmer v. Johnson*, 30 F. 3d 451, 456 (CA3 1994); *State v. Cobb*, 875 S. W. 2d 533, 535 (Mo. 1994); *People v. Sailor*, 480 N. E. 2d 701, 703-710 (N.Y. 1985).

The Double Jeopardy Clause does not protect in measured steps. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced . . ." *Burks v. United States*, 437 U. S. 1, 11, n. 6 (1978). This absolutism will in turn give appellate courts reason to review the factual basis of a sentence less strictly. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *United States v. Tateo*, 377 U. S.



463, 466 (1964). The same reasoning applies to the sentencing hearing.

*Bullington's* continued existence will also cause states to withdraw protections from defendants in order to avoid the Double Jeopardy Clause. See, e.g., *Swisher v. Brady*, 438 U. S. 204, 210-212 (1978) (state court changing juvenile court rules in response to district court ruling that state's juvenile justice system violated double jeopardy). Putting more structure into sentencing, making it more trial-like, may well be to defendants' benefit. Such structure would make them less subject to individual judges' whims and prejudices. Yet *Bullington* latches on to the trial-like aspect of the sentencing proceeding to extend the reach of the Double Jeopardy Clause.

Unless *Bullington* is removed, states will have every reason to weaken defendant's protections in order to avoid additional constitutional burdens. If the state can restructure a proceeding so that there is no chance of a double jeopardy violation, but the ultimate impact on defendant is the same or worse than had the proceeding remained unchanged, there is no reason to extend the Double Jeopardy Clause to the original proceeding. See *United States v. DiFrancesco*, 449 U. S. 117, 142 (1980). Substance, not form, is supposed to govern the Double Jeopardy Clause. See *ibid.*

*Bullington* is not the only example of this Court creating perverse incentives contrary to the interests of those it seeks to protect. Beginning with *Wolff v. McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutional protected liberty interests. See *Sandin v. Conner*, 515 U. S. 472, 477-482 (1995) (reviewing cases). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 479-480.

This Court began to recognize the consequences of such perverse incentives in *Hewitt v. Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal

courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of the discretion given to prison officials became the norm. See *Conner, supra*, 515 U. S., at 481 (discussing *Olim v. Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Dept. of Corrections v. Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid the creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 515 U. S., at 482. The perversity of such incentives helped justify *Conner's* decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 483, n. 5. *Conner* shows the way out of *Bullington's* mess. Decisions or methodology that deters government from voluntarily granting more rights to individuals cannot be tolerated.

*Amicus* submits that *Bullington* should be overruled. Any attempt to salvage *Bullington* "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U. S. 106, 119 (1940). This prior doctrine was first enunciated in *Stroud v. United States*, 251 U. S. 15 (1919), and most recently affirmed in *United States v. DiFrancesco*, 449 U. S. 117 (1980). The prior, better rule is simple. A sentencing decision does not have the finality of an acquittal; the Double Jeopardy Clause does not apply.

## CONCLUSION

The decision of the California Supreme Court should be affirmed.

March, 1998

Respectfully submitted,

CHARLES L. HOBSON

*Attorney for Amicus Curiae  
Criminal Justice Legal Foundation*